89-1984

Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1989

FRANK L WHITMER AND JOAN P WHITMER,
Petitioners
v
JOHN HANCOCK MUTUAL LIFE INSURANCE CO., SKIDMORE, OWINGS AND MERRILL, SUDLER AND CO., SUDLER MARLING, INC., TISHMAN CONSTRUCTION CO., ALUMINUM COMPANY OF AMERICA, ADMIRAL HEATING AND VENTILATING, INC., R B HAYWARD CO., UNIVERSAL SHEET METAL CORP. d/b/a UNIVERSAL-HAYWARD, CUPPLES PRODUCTS CORPORATION, a DIVISION OF H H ROBERTSON CO., H H ROBERTSON CO., 175 EAST DELAWARE PLACE HOMEOWNERS ASSOCIATION, H S NACHMAN AND ASSOCIATES, INC., ENVIRONMENTAL SYSTEMS DESIGN, INC., L C KOHLMAN, INC., GENERAL PARKING CORPORATION, WILSON & McILVAINE, CITY OF CHICAGO, and DOES 1-50 INCLUSIVE,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Frank L Whitmer and Joan P Whitmer
American Citizens on their own behalf, Petitioners
221 Pardridge Place, DeKalb IL 60115, 815/758-7272
15 June 1990

LAWthority® June 1990

QUESTIONS PRESENTED

1. Whether a district court can rule on a tainted 28 USC 1404(a) venue motion that has been substantially attacked by FRCP 11 sanctions and FRCP 12(f) strike motions before ruling on the sanctions and strike motion.

2. Whether an Administrative Law Judge's Social Security Disability judgment is res judicata on the federal district courts under 28 USC 1404(a) for transfer purposes.

3. Whether a Federal District Court can suppress or ignore uncontroverted medical affidavits and such evidence in balancing under 28 USC 1404(a) to the serious detriment of a party.

4. Whether a conflict between the circuits should continue under 28 USC 1404(a) as the selection of to appeal or mandamus, the conversion of a notice of appeal to mandamus, and the finality doctrine reliefs.

5. Whether an unannounced and unwritten District policy on venue transfer under 28 USC 1404(a) is impermissible, unconstitutional, and a violation of due process.

6. Whether the United States Court of Appeals can act on a motion to dismiss where a critical five pages (statement of facts, statement of the questions, statement of reasons, including jurisdictional statement) were stripped from the motion by the defendants and the court was so informed. It was insufficient to act upon.

7. Whether the Court below erroneously applied the decision in *Jesko v United States*, 713 F2d 565, 567 (10th Cir 1983), not having the necessary essential facts before it. Of necessity, *Cohen* and *Jesko* and the other cases cited are fact oriented.

8. Whether the Courts below are to push relentlessly toward "moving the case" regardless of the documented medical consequences to a party or pro se, ignoring meaningful due process—and actually bringing on more disruptions as the victim collapses.

9. Whether the Federal District Court violated the intent of 28 USC 1292(b) or whether that act is unconstitutional in that it makes no provision for relief where a federal district judge has willfully violated the rules, such as a suppression of essential evidence, and then refuses to certify for appeal and blocks any right to appeal

10. Whether a toxic tort plaintiff in a civil case is to be subjected to the dangers that discovery by the defendant puts the allege criminal in control of the victim's life and health.

LIST OF PARTIES

The parties are the same as those listed in the caption of this petition.

The parties to the proceedings are the petitioners, Frank L Whitmer and Joan P Whitmer, private citizens on their own behalf, owners of a condominium at the John Hancock Center in Chicago.

The respondents are companies, partnerships, corporations, a municipality, a homeowners association and a law firm.

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TABLE OF AUTHORITIES

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Petitioners Frank L and Joan P Whitmer respectfully ask that a writ of certiorari issue to review the orders of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled proceeding on December 14, 1989, rehearing denied January 16, 1990, and the orders of the United States District Court for the Northern District of Illinois entered on October 2, 1989 and October 26, 1989.

Those orders affirmed the transfer of this case between district divisions, in which the court favored the defendants' convenience instead of the health and life of the plaintiffs.

OPINIONS BELOW

The orders of the United States Court of Appeals for the Seventh Circuit by Circuit Judges Harlington Wood Jr., Richard D Cudahy and Richard A Posner are not reported. The orders of December 14, 1989 and January 16, 1990 are reproduced in the appendix hereto, as A, B, and C, *infra*.

The memorandum opinion and order of the United States District Court for the Northern District of Illinois, Western Division (Roszkowski, S J) and the denial of certification have not been reported. The text is reproduced in the appendix hereto as Appendix D and E, *infra*.

JURISDICTION

The jurisdiction of this Court to review the judgment of the Seventh Circuit is invoked under 28 USC § 1254(1).

Petitioners brought this suit in the Northern District of Illinois, Western Division, invoking federal jurisdiction under the venue statutes of RICO and civil rights, the Constitution of the United States and 18 USC 1961, et seq., particularly 1964(a), (c), and 1965(a), (b), (c), (d); 42 USC § 1983 et seq., particularly 1885(3), and 28 USC § 1331, 1337, 1339, 1343, 1355, 1357, 1391 and 1395.

The petitioners live in the Western Division. The Venue provisions of RICO provide for venue against any person in any district in which he resides, is found, has an agent, or transacts his affairs. The Court and the defendants finally conceded that venue was proper in the Western Division. On October 2, 1989 the Western Division denied the petitioners' objections to the respondents' motions for transfer of venue within the district from Western to Eastern Division. The district court refused to certify the order as appealable.

A timely Motion to Extend Time for Filing Petition for Rehearing/Reconsideration of December 14, 1989 Orders Involving Substantial Constitutional Issues in Seventh Circuit Appeals 89-34241 and 89-3478 was filed. The Court treated it as a *"motion to reconsider"* and denied it January 16, 1990. However, petitioners Notice of Appeal had been stripped by defendants of five critical pages.

On April 6, 1990 petitioners made a timely application to Associate Justice John Paul Stevens for an extension of time to file their petition for writ of certiorari. The Honorable John Paul Stevens issued an order on April 13, 1990, extending the time for filing a Petition for a Writ of Certiorari in this case to and including June 15, 1990. (Number A-712.)

STATUTE INVOLVED

28 USC § 1254 Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon a petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

STATEMENT OF THE CASE

This case involves a transfer of venue within a district from one division to another, for the convenience of the defendants and over the life and death health objections and affidavits of the petitioners and their physicians.

Petitioners use the extended term "defendants" under the concept of conspiracy, as petitioners have pled a continuing conspiracy in their complaint.

Why Petitioners are pro se

Petitioners are non attorneys, litigating on their own behalf—but not by choice. A recognized condominium expert in Illinois represented and advised petitioners in the

investigation of the serious condominium, real estate, and municipal law violations and prepared the initial draft complaints in this complex case. He later took "*of counsel*" with a law firm with a conflict of interest with the City case.

In the state trial court, the Whitmers were each abandoned by counsel over their objections, without justifiable cause, without their consent, and with extreme prejudice to their cause of action as plaintiffs.

At no time did a court even question or was concerned about the state of the client's case, the validity of counsel's representations, or the effect on the case. Its only concern was to summarily grant withdrawal. The procedures and rules that exist and those necessary to protect the serious Constitutional Rights to due process, equal protection, and the right of access to the courts were ignored in violation of the petitioners' rights.

After over $100,000 of attorneys fees, there has been NO discovery given to the petitioners in what is considered a highly political case. This includes no discovery for them of medical or toxic exposures which caused their life threatening illnesses since the filing of their federal complaint. Petitioners are obviously not hostile to paying attorneys.

One attorney didn't do any discovery in five years, another did one interrogatory to the wrong defendant, and another refused to proceed once plaintiff Joan P Whitmer's intervention of right was granted by the Illinois Appellate Court. Each attorney was a respected member of the bar. Their fundamental efforts were to force a settlement. Plaintiffs had made clear they needed serious health information and correction of the building more than money. In plaintiff Joan P Whitmer's intervention in the City of Chicago case she did not actively seek damages.

Petitioners extremely diligent

Petitioners have been extremely diligent while ill, and handicapped. They have never attempted to delay anything, only asking that they be given meaningful due process.

At last count they made in mid 1989, petitioners have separately and jointly filed some 240 motions, pleadings and other papers, responded to another 177, been involved with 65 hearings with transcripts, and subject to 159 orders in those three courts, bringing a total of 641.

Not frivolous or dilatory—a necessary 641 in 743 court working days—or almost one motion, document, response, hearing or order to be researched, drafted, written, published, served and filed. An average of almost one court action each working day. An impossibility for any pro se or even a modest law firm.

In the last three years, the actual period of their pro se appearances, petitioners have been separately and jointly in three courts at the same time for all but five months.

Litigation History

Petitioners' home at the John Hancock Center in Chicago, Illinois turned into a nightmare which is the subject of this lawsuit.

On the complaint of petitioner Joan P Whitmer, in 1983 the City of Chicago[1] filed suit against the John Hancock Mutual Life Insurance Company, Sudler & Company and 175 East Delaware Place Homeowners Association, who are also defendants in this suit. The City suit charged violation of the minimum mandatory health and safety requirements necessary to protect the residents of this mixed-use one-hundred story skyscraper.

After having filed the suit, the City of Chicago abandoned any aggressive adversarial attempts to enforce the building

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1 City of Chicago v John Hancock Mutual Life Insurance Company, Sudler & Company and Homeowners Association, 83 M1 404279, Circuit Court of Cook County, Illinois, Municipal Department, First District

and health safety codes. The defendants' total defense was that the City of Chicago had approved the construction plans and violations and was estopped from enforcing its health and safety ordinances.

But the housing court did finally order correction and the defendants entered into agreed orders with the City to make some changes in the monitoring and presumably the operation of the building to alleviate the pollution. No defendant has as yet been ordered to eliminate the pollution created by the construction and operation of this structure. Violations of the mandatory minimum health and safety sections of the Chicago Building Code still continue.

A new problem is a United States Environmental Protection Agency test report of November 11, 1989 showing there is dangerous deteriorating and friable asbestos in the apartments.

Petitioners federal complaint, filed in the United States District Court, Northern District, Western Division (Rockford, Illinois) is in part a timely refiling by petitioner Frank L Whitmer of his voluntary dismissal of his state case under Illinois Code of Civil Procedure § 2-1009.[2] The federal complaint alleges multiple counts including, but not limited to personal injury and negligence, violation of the Racketeer Influenced and Corrupt Organizations Act and RICO conspiracy, claim against defendants under the civil rights act 42 USC § 1983 and 1983 conspiracy, civil conspiracy, fraud, fraudulent concealment, fraudulent concealment of a cause of action, consumer fraud, negligence, implied warranty, nuisance, trespass and intentional infliction of emotional distress.

MEDICAL DISABILITY
OPPOSITION TO CHANGE OF VENUE
Social Security Administrative Law Judge's

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2 82 CH 7453, Circuit Court of Cook County, Illinois, F Whitmer v Hancock et al.

adjudication of total disability

Petitioners maintain that the instant the Magistrate found and the defendants admitted that venue was proper in the Western Division, the Social Security Administration's Administrative Law Judge's adjudication was preclusive of any consideration of defendants' motions for transfer of venue for their "convenience" under 28 USC 1404(a) because petitioner Frank L Whitmer was legally and is totally disabled in that he can no longer tolerate the pollutants to, from, and at the Eastern Division Court. He was ordered totally disabled and continues to receive full benefits.

The federal district court order ignored petitioner's claim of right.

Petitioner Frank L Whitmer was found to be totally disabled at a hearing (not an initial application) by a Social Security Administration Administrative Law Judge effective January 1, 1983. This determination was based upon extensive documentation, including 22 exhibits, from the Mayo Clinic, and a consulting examining physician for the Social Security Administration.

Petitioner Frank L Whitmer has been diagnosed by such reputable medical organizations and their specialized physicians as the Mayo Clinic, Northwestern University Medical, and the DeKalb Clinic.

Rehabilitation Act of 1973, 29 USC 701 et seq

Petitioner is diagnosed as hypertensive, with atrial disease, arrhythmia, severe obstructive and central system sleep apnea, peripheral neuropathy, and glucose intolerance—diabetes mellitus. Each qualify as a handicap under the provisions of the Rehabilitation Act of 1973. Each is sufficient to meet total disability criteria without the toxic exposures and consequent severe chemical susceptibility disorder that he charges defendants also caused. Further exposure would increase the above symptoms and reactions, many of which have a hypoxic component.

Both Petitioners Frank L and Joan P Whitmer are "*handicapped persons*" as defined by the Rehabilitation Act of 1973, 29 USC 794, § 706(8)(B) and are entitled to the protections of that Act in that they are not to be subjected to discrimination and harm or denial of their right to access to a reasonably healthful courtroom environment.

The transfer order ignored petitioners stated claim of right of the protections of the Rehabilitation Act of 1973 in that both petitioners qualify as handicapped and under the Act are entitled to a pretrial and trial in an environment that will not harm, further disable, or kill them.

The Act is also directed to the Judicial branch in that it is the stated law of the land, involves both federal funds, and the courts themselves are serviced by the General Services Administration.

Thirty-Five million handicapped plus their families

The issues presented are of interest to far more than these two pro se parties. Congress stated in PL 93-516 on December 7, 1974 that there are seven million children and at least twenty-eight million adults with mental or physical handicaps. When family members are added it represents an astounding figure. There is a growing number of at least parties and witnesses that need these protections and considerations as well as their families and other affected people—in short, a large percentage of the public certainly exceeding fifty million adults. This petition is propitious because the Rehabilitation Act of 1973, the related Access Acts and additional legislation has become the stated policy of the United States, and its provisions have reasonably and properly entered the Federal Courts.

Health

The City of Chicago has been and is recognized as a non-attainment area by the United States Environmental Protection Agency as to ambient pollutants, such as carbon monoxide and ozone. It is unsafe for such risk groups as listed on the preceding page.

The record contains a wealth of substantiation by petitioners' physicians and other professionals stating life threatening harm for at least one of the petitioners if their cause remains transferred from the Western Division, Rockford, to the Eastern Division, Chicago

The Courts and defendants, by their transfer orders and motions, argue over a few miles, while petitioners have been plunged back into the very environment they deliberately fled nine years ago for a safer rural environment in the country.

No defendant is inconvenienced in any way other than some reasonable increase in the cost of litigation. In fact, if the court will review the names of these corporations, they will see they are of a size, stature and liquidity that they are able to sacrifice some additional monies for the lives of these two plaintiffs.

After having resided continuously in their condominium unit in the Hancock Center for a period of several months, petitioner Frank Whitmer began to experience symptoms of illness which physicians initially were unable to relate to any cause.

Approximately August 28, 1981, Frank Whitmer was advised by his physician that his medical problems could be in whole or in part caused by exposure to carbon monoxide and exhaust fumes. Approximately October 27, 1981 Frank Whitmer was advised by a specialist that he was suffering from a permanent sensitivity to motor vehicle exhaust caused by inadequate ventilation in his condominium and the resulting continued exposure to inhalation of carbon monoxide and other noxious by-products of motor vehicle exhaust and other pollutants from the six floor enclosed indoor parking garage on the lower floors of this multi-purpose building, and other parts of the building. Such has been confirmed by his experts. At the same time Joan Whitmer had a similar severe hearing loss and was later advised by her physician that he considered it due to the same exposures.

For these reasons, involving his health and his life, and according to his physicians, petitioners filed this suit in the Western Division instead of the Eastern Division where they cannot occupy, but have paid for, their city condominium since 1981.

Plaintiff found that when he followed the medical instructions to avoid toxics by the Mayo Clinic and others, he felt better and could function reasonably well. When he didn't follow the medical instructions and was exposed, he became seriously ill with a repetition eventually of the cardiovascular, respiratory and other symptoms.

- *"Avoid carbon monoxide exposure."* MD. Mayo Clinic, May 17, 1984.
- *"Unable to tolerate simple fumes"* *"not even travel back and forth to work in a routine fashion because of his exposure to carbon monoxide and other airborne pollutants."* Finding of Social Security Administrative Law Judge, July 16, 1984. It is equally true today.
- *"medically contraindicated for this patient to travel into the City of Chicago for any reason."* R C Filice, MD., April 17, 1989.
- *"not travel to the Chicago area . . . as any exposure would be potentially dangerous, possibly fatal or totally disabling."* William K Lee, MD., Cardiologist, Internist, Chief, Coronary Care Unit, May 9, 1989.
- *"not travel to Chicago and consciously try to avoid any further exposure to toxic fumes . . ."* Abraham N Lotan, MD., Otolaryngologist, June 15, 1989.
- *"he must avoid all similar toxic exposures and to move out of . . . the Chicago urban area."* Theron G Randolph, MD., Allergist, June 17, 1989.

Plaintiff Joan P Whitmer has now become totally disabled. She had an unexpected severe drop in hearing at the same time Plaintiff Frank L Whitmer had his hearing loss and

tinnitus in their condominium apartment in the John Hancock Center. Her speech discrimination is now a severe loss of 40% or more under the Social Security Administration rules and is well documented by the Mayo Clinic, the Northwestern Memorial Medical Center and Presbyterian St Luke's Hospital.

Further toxic exposures would destroy her remaining hearing.

> *"avoid further exposure to chemical pollution, especially petrochemicals, auto exhaust . . . "*
> George E Shambaugh Jr., MD., Otologist-Allergist, June 14, 1989.

Petitioners are ill, disabled, and are living on a small pension social security and disability. They will soon be completely broken in health, in money, and in their their faith in justice.

de minimis

Defendants moved in the district court to transfer venue within the district from Western to Eastern Division. The district court (Stanley J Roszkowski) refused to rule on any motions, insisting that venue first be determined. He determined that the case involves an intradistrict transfer as opposed to an interdistrict transfer, stating that either division's legal mechanism could adequately try the case.

The judge transferred the cause of action to the Eastern Division of the Northern District of Illinois, for the "*convenience* of the defendants, stating:[3]

> "On balance, this Court has little difficulty in concluding that the inconvenience, expense and hardship to defendants which would accompany a trial of this case in Rockford, Illinois far outweighs the de minimus (sic) inconvenience and hardship to plaintiffs."

Black's Law Dictionary, 5th Abridged edition says "De minimis non curat lex. *The law does not care for, or take*

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3 October 12, 1989 Memorandum Opinion and Order, page 7

notice of, very small or trifling matters. The law does not concern itself about trifles or insignificant matters."

: That the medical affidavits and documentation provided the district court, the that injury to petitioners health, physical, financial and emotional states, would be construed as "*very small, trifling or insignificant*" is insulting.

Never at any time did the district court come to grips with the medical facts of petitioners' conditions. He ignored the uncontroverted facts of the health of these plaintiffs and belittled their physical illness with the phrase "*de minimis inconvenience.*" This is a prejudicial, hostile, insulting statement by a judge.

Balancing a doctrine of convenience against the established fact of a party's survival completely misconstrues the doctrine of forum non conveniens and 28 USC 1404(a). Petitioners, who are in straitened financial circumstances, are forced to pay the substantial additional costs.

DENIAL OF MEANINGFUL DUE PROCESS TO AN ADJUDICATED AND LEGALLY DISABLED, HANDICAPPED PRO SE

FRCP 60(a)

As the magistrate, P M Mahoney, in his report and recommendation to transfer venue from Western Division to Eastern Division had conspicuously omitted any mention of petitioner Frank L Whitmer's Social Security Administrative Law Judge's adjudicated total disability, or Dr Theron G Randolph's affidavit of October 17, 1988 in careful explanation of the acute illnesses and their effects —petitioners commenced a careful search of the docket for these items. Plaintiffs also found that a transcript of January 27, 1989 was missing. Therefore, petitioners filed a motion for an emergency addition of these missing critical records on August 1, 1989 under FRCP 60(a).

Petitioners stated that "*This matter is urgent as a ruling on intradistrict interdivisional venue is imminent.*"

Petitioner Frank L Whitmer personally delivered the copies to the Court Clerk, Sandra Lichner, and the judge's copy to his law clerk, Steve Brody. Petitioner pointed out the serious importance of the missing documents to each of them asking their help in this administrative error.

Still not hearing from Judge Roszkowski, nor from the Clerk about the decision on what procedure the Court would follow, petitioners filed a supplement and memorandum in support on August 30, 1989.

Judge Roszkowski then denied petitioners' objections to the transfer of venue for severe health reasons and ordered their case transferred to Eastern Division. His elaborate and inaccurate order never once mentioned any of the missing documents, petitioner Frank L Whitmer's total disability or plaintiffs' handicaps.

Contrary to what he said, petitioners were never permitted venue—or emergency health discovery—he had also refused to rule on their motion to compel such discovery.

Petitioners then filed a motion and renewal of their FRCP 60(a) motion on October 18, 1989.

In fact, the court had done nothing about these critical missing documents. On November 3, 1989, the judge's law clerk telephoned petitioner Frank L Whitmer to ask which documents were missing from the court file and telephoned later stating that they had been found.

Obviously these critical medical documents were not used or "balanced" as required, on petitioner Frank L Whitmer's behalf. Clearly this was an abuse of judicial power and discretion, certainly amounting to a direct suppression of evidence.

Trial Court Controlling the Record

Judge Roszkowski constantly accused petitioners of "papering" him. Petitioners suggested it took at least two pages to counter a single lie by the defendants and that stopping defendants' prejudicial falsifications would solve the problem.

The judge then instructed that nothing was to be filed without leave of court, and of course petitioners could not press their objections fully as their cause, and their appeal itself, was dependent upon the judge's good will and he refused to listen. *International Business Machine Corporation v Edelstein*, 526 F2d 37, 45 (1975) clearly established that preventing the making of a record for purposes of appeal was impermissible.

Unwritten policy

The trial judge's memorandum opinion and order also states on page 9 that:

> "This Court further adds that it has been a longstanding reciprocal policy, albeit an unwritten one, to transfer cases from the Western Division to the Eastern Division, or the reverse, on balance when handling all the proceedings in one or the other division proves to be most convenient for all the parties, witnesses and in the interest of justice and does not conflict with some applicable venue statute such as 28 USC § 1391."

This action invites a death sentence for ill persons or toxic tort victims like the petitioners, who purposely moved away from the very area the court now requires them to return to in order to prosecute their case. It is not only deadly but it is very simply unconstitutional and neglects the RICO provisions.

Plaintiffs documented Motions for Sanctions and to strike were never ruled on

The trial court has acted upon tainted venue motions based upon false and misleading papers filed by defendants to petitioners' detriment.

Petitioners Frank L Whitmer and Joan P Whitmer have pled that defendants' Motions for Change of Venue for Convenience under 28 USC § 1404(a) are so substantially

false that petitioners filed motions under Federal Rule of Civil Procedure 11 Sanctions and Federal Rule of Civil Procedure 12(f) Striking, for extreme prejudice.

One sanction motion alone dealing mainly with venue raised some eighteen sanctionable points in twelve pages, and over forty-eight paragraphs.

One of the sanctionable points included the statement that plaintiffs were the only two people claiming injury, while defendants already knew of—had been served with summons by, and had withdrawn the entire court file in another personal injury case, 86 L 12567, *Joyce Warner v John Hancock Mutual Life Insurance Company*, et al.

This was an intentional, and a direct lie.

The trial court has refused to recognize the violation of Rules 11 or 12 as it was duty bound to do.

The orders of the District Court and the Court of Appeals constitute abuses of discretion and are clearly erroneous as a matter of law based on the admitted facts by petitioners and the clearly false facts offered by the defendants.

As a result, petitioners filed a notice of unconstitutionality of Federal Rule of Civil Procedure 11 for lack of equal protection, which was entered by the district court on March 15, 1989.

Rule 11 requires a court to impose sanctions, they are mandatory, but the trial court has refused to do so. "Dismissal may be an appropriate remedy." *Touchstone v G.B.Q. Corp.*, 596 F S 805, 810 (ED La 1984).

The Advisory Committee provided guidelines as to how it expected discretion would be exercised by the district judge in Rule 11:

> *"The time when sanctions are to be imposed rests in the discretion of the trial judge . . . in the case of motions at the time when the motion is decided or shortly thereafter."*

Sanctions should be imposed as closely as possible to the time when the offending conduct occurred. See *Thomas v Capital Sec Sev.*, Inc., 836 F 2d 866, 881 (5th Cir 1988).

The Fifth Circuit explained that a proper sanction assessed at the time of the offense usually has some measure of deterrent effect on subsequent abuses and resultant sanctions.

Petitioners have not had the help of such a deterrent effect.

REVIEW

Appeal

On October 12, 1989 joint petitioners filed their Notice of Joint Appeal (of Right, by Permission, by Allowance, or by a Petition for Mandamus). In presenting their statement of reasons, petitioners pointed out that some circuits will treat an appeal from an interlocutory order as a motion for leave to file a petition for mandamus. This Circuit did not choose this option. Others do. It was error and a conflict not to do so.

Judge Stanley J Roszkowski had stated to plaintiffs (petitioners) to "*go ahead and appeal*" but later denied certification. On November 7, 1989 petitioners filed their "Notice of Joint Appeal/Consolidation/Amendment to Joint Appeal/or Mandamus" in the United States District Court for the Northern District of Illinois, Eastern Division.

This order, with or without prejudice, is final and appealable under 28 USC § 1291.

Discovery is available to ascertain facts relating to jurisdiction and venue. *Oppenheimer Fund, Inc v Sanders*, 437 U S 340, 351 n 13 (1978). Contrary to his statement, Judge Stanley J Roszkowski refused to rule on petitioners' motion to compel.

Finality Doctrine Relief and Cohen collateral order doctrine

The courts have used judge-made exceptions to relieve the Finality Doctrine when it would be unfair to a party.

In *Coopers & Lybrand v Livesay*, 437 US 463, 468 (1978), the Court relying on *Abney* and *MacDonald*, stated:

s"Continuing by discussing the "*death knell*" doctrine, appealability turns on the court's perception of that impact

in the individual case. Thus, if the court believes that the plaintiff has adequate incentive to continue, the order is considered interlocutory; but if the court concludes that the ruling, as a practical matter, makes further litigation improbable, it is considered an appealable final decision." (at 471.)

Obviously, petitioners' case and its life or death health consequences brings a new, and macabre accent to that *"death knell"* discussion.

Under any concept of review, the transfer order under 28 USC 1404(a) is under the *Cohen* rule and the requirement of finality must be given a "practical rather than a technical construction." *Cohen v Beneficial Indus. Loan Corp.*, 337 U S 541, 546 (1949).

"The Cohen doctrine allows appeals to be taken from orders that (1) finally determine claims entirely collateral to and separable from the substance of other claims in the action, (2) require review because they present significant, unsettled questions, and (3) cannot be reviewed effectively once the case is finally decided." *Huie v Bowen*, 13 Soc Sec Law Rep, 256, 788 F2d 698, 702 (11th Cir 1986).

The *Cohen* case is a prediction of the hopelessness of these petitioners ever being heard, on appeal on the issue presented here. If the case is tied to the Eastern Division, these petitioners may not participate for the protection of their lives. If an appeal is taken, this question of venue will be moot. If petitioners cannot appeal here, they cannot appeal ever.

The federal judiciary, in an attempt to reduce the burden on appellate courts, has regularly invoked the final judgment rule. This rule limits appeals to those from final decisions of the district court. The court, however, has frequently found it difficult to harmonize this concern with the desire to avoid the hardship resulting from erroneous interlocutory orders. The collateral order doctrine, which permits the immediate

appeal of a small class of interlocutory orders represents an attempted resolution of this conflict. This doctrine, however, has been inconsistently applied.

Further in reviewing state court judgments under 28 USC § 1256 the U S Supreme Court using *Cohen*'s practical rather than technical pragmatic approach found an order overruling an objection to venue to be final under the particular circumstances of the case. *Mercantile Natl'l Bank v Langdeau*, 371 US 555 (1963).

The U S Supreme Court and the U S Courts of Appeals have considered final and appealable similar financial, health, and procedural questions.

An order denying a motion to proceed in forma pauperis in the district court. *Roberts v United States District Court*, 339 US 844 (1950).

An order determining that an accused is incapable of standing trial as a result of present insanity. *Higgins v United States*, 205 F2d 650 (CA 9th 1953).

An order refusing stay of the execution of a nonappealable order and simultaneously refusing to make the underlying order appealable by issuing a certificate under FRCP 54(b) as the court did similarily in this case. *Redding & Co v Russwine Const Corp.*, 417 F2d 721 (CA DC 1969).

The order is final determination of a claim of right "*separable and collateral to*" rights asserted in the action;

The order transferring venue for the convenience of the defendants under 28 USC § 1404(a) is final in that the Social Security Administrative Law Judge's decision declaring plaintiff Frank L Whitmer to be totally disabled in that he can no longer tolerate the City of Chicago pollution without deadly harm, and that petitioners five main physicians and other physicians have stated cumulatively, in some twenty-seven affidavits, letters, and reports specific harmful or disabling reactions and even that each plaintiff will be further injured, disabled, severely and even fatally.

A ground for jurisdiction is the "*collateral order doctrine.*" The exception to the final judgment rule was recognized in 1949 in *Cohen v Beneficial Industrial Loan Corp.*, 337 US 541 (1949), 69 S Ct 1221, as follows:

"is obvious that if Congress had allowed appeals only from those final judgments which terminate an action this order would not be appealable." "[t]his order of the District Court did not make any step toward final disposition of the merits of the case and will not be merged in final judgment. When that time comes, it will be too late effectively to review the present order and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably. . . . the matters embraced in the decision appealed from are not of such an interlocutory nature as to affect, or to be affected by, decision of the merits of this case."

"This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction." *Bank of Columbia v Sweeney*, 1 Pet 567, 579; *United States v River Rouge*, 269 US 411, 414; *Cobbledick v United States*, 308 US 323, 328.

"The effect of the statute [28 USC § 1291] is to disallow appeal from any decision which is tentative, informal or incomplete. Appeal gives the upper court a power of review, not one of intervention. So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal. But the District Court's action upon this application was concluded and closed and its decision final in that sense before the appeal was taken."

"Nor does the statute permit appeals, even from fully consummated decisions, where they are but steps towards

final judgment in which they will merge. The purpose is to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment . . ."

"We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it."

"*Cohen* was followed by *Swift & Co Packers v Compania Colombiana Del Caribe*." *Swift & Co Packers v Compania Colombiana Del Caribe*, 339 US 684 (1950), 688-689."

"Appellate review of the order dissolving the attachment at a later date would be an empty rite after the vessel had been released and the restoration of the attachment only theoretically possible. Cf. *The Panaghia Kathariotisa*, 165 F2d 430 (3 Cir 1948). Under these circumstances the provision for appeals only from final decisions in 28 USC § 1291, should not be construed so as to deny effective review of a claim fairly severable from the context of a larger litigious process. See *Cobbledick v United States*, 309 US 323, 328-329. The situation is quite different where an attachment is upheld pending determination of the principal claim. Such was *Cushing v Laird*, 107 US 69, which is urged on us. In such situation the rights of all the parties can be adequately protected while the litigation on the main claim proceeds."

"*Cohen* and *Swift & Co Packers* gave rise to what is termed the collateral order doctrine, or the offshoot rule, or simply the *Cohen* rule. The effect of the rule is to make final, and thus appealable under 28 USC § 1291, certain orders that do not fully and finally determine the controversy between the parties.

The district court's order conclusively determined the disputed question of transfer and, in so doing, resolved an important issue completely separate from the merits of the

action. *Cohen*, supra, 337 U S at 546. Therefore, the district court's order is reviewable.

Certainly, also, this case presents significant unsettled questions involving not only the petitioners but also the other occupants of the John Hancock Center in Chicago.

Petitioners claims for the special uncontrovertable RICO venue lies in their health, disability, handicaps, and life and death—facts. Such venue considerations in no way deal with the merit of any causes of action.

There is no effective way in which the district court's order granting a transfer could be reviewed later. If petitioner Frank L Whitmer survives—the question is moot. If petitioner Frank L Whitmer does not survive-his case is mooted. The law dictionary is surprisingly to the point, "no longer presents a justiciable controversy because issues involved have become academic or dead."

Mandamus

Petitioners have attempted to appeal the lower court's order twice through their notices of appeal stating this conflict between the circuits, and that their notices of appeal could be converted to a petition for mandamus if necessary. The United States Court of Appeals for the Seventh Circuit did not accept that procedure, and dismissed the appeals.

Certification

On petitioners' appeal, the Seventh Circuit on December 14, 1989 entered an order directing that petitioners appeal be dismissed because the district court's order was not appealable as of right, pursuant to 28 USC § 1291, because the order did not dispose of the case, nor was the order appealable as a collateral order. The Seventh Circuit also stated the district court's order was not appealable as an interlocutory order because the district court denied certification, which is required by 28 USC § 1292(b). The court stated a petition for writ of mandamus was the appropriate avenue for reviewing an order denying or

granting a motion for transfer before final judgment is entered. (Other relief sought was also denied.)

Petitioners determined that their continuing physical and health injury by the Federal District Courts required proceeding under certiorari to this United States Supreme Court before the actions of these other courts resulted in petitioner's Frank L Whitmer's death.

REASONS FOR GRANTING THE WRIT
Certiorari

Congress passed the Evarts Act[4] providing for resolution of intercircuit conflicts through Supreme Court review on writ of certiorari. The leading commentators on the Supreme Court's practice assert that uniformity of decision among the courts of appeals was a primary purpose of the certiorari jurisdiction. The Supreme Court has identified the existence of a conflict among the circuits as an important consideration in deciding whether to grant certiorari.[5]

Such a clear life or death question as that of these petitioners should not require conflicts to help this Supreme Court with fully aired issues before the Court is called upon to decide them.

The *Van Dusen* reasoning appears to govern transferred federal claim cases as well.[6] Congress did not intend a transfer under section 1404(a) to eliminate those "venue privilege" advantages.[7] Where trial in the forum selected by plaintiff would impose a heavy burden on the defendant or the court dismissal would be proper unless plaintiff could offer "specific reasons of convenience supporting his choice."[8] Petitioners have claimed and support life or death reasons.

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4 The Circuit Courts of Appeals Act of 1891, ch 517, 26 Stat. 826

5 See Sup Ct R 10.1(a), originally 19.1(b), specifying conflict between circuits as ground for grant of certiorari.

6 *Van Dusen v Barrack*, 376 U S 612 (1964)

7 See 376 US at 633-34

8 *Piper Aircraft Co v Reyno*, 454 US 235 (1981)

- The questions are "*too important to be denied review*," in the sense that they "*present serious and unsettled questions*";
- The preclusiveness of a legitimate disability determination of a federal administrative court.
- The protections of the Rehabilitation Act.
- The right to Access to Justice and the Courts without unnecessary risk of health or life, or the forced choice between health and life—or justice.

This improper venue transfer is appealable because it causes irreparable injury. The Federal District Court, in the absence of certiorari will move this case to the irreparable (or fatal) harm to these petitioners, when an appeal would be useless.

This review cannot, in the nature of the questions that are presented, await final judgment because when that time comes, it will be too late to review the order and the rights will have been lost irreparably.

Petitioners have no other adequate means to secure the desired relief, will be damaged or prejudiced in a way not correctable in final appeal.

This means that petitioners upon transfer must either drop their suit—or risk their lives.

Again, the issues are of interest to far more than these two pro se parties. There are seven million children and at least twenty-eight million adults with mental or physical handicaps. When family members, parties, witnesses and others are added it represents an astounding figure—in short, a large percentage of the public, more than fifty million adults. The Rehabilitation Act, the related Access Acts and legislation is now the stated policy of the United States, and have reasonably and properly entered the Federal Courts.

Petitioners are now disabled and handicapped and they have found that they have had to fight for every necessary

entitlement—year after year in each court with constant hostility and attack.

Conflict In The Circuits

A basis of the case is that there is a conflict in the circuits regarding venue appeal and mandamus decisions that may terminate litigation and thereby become utterly final in reality.

There is a conflict in the circuits regarding **Appeal and Mandamus** procedures and consequences.

Sterling Forest Associates Ltd v Barnett-Range Corp., 840 F2d 249, 252 (4th Cir 1988)

Cone Memorial Hospital v Mercury Const., 103 S Ct 927, 933 n6 (1983)

Corcoran v Ardra Ins Co Ltd., 842 F2d 31, 35 (2nd Cir 1988)

Petitioners filed their "Notice of Joint Appeal of Right, By Permission, By Allowance, or by a Petition for Mandamus" on October 12, 1989, stating: "*some circuits will treat an appeal from an unappealable interlocutory order as a motion for leave to file a petition for mandamus.*" There are many examples of this, such as the recent case of *Sterling Forest Associates Ltd v Barnett-Range Corp.*, at 252 which cites three circuits that do so—Third, Fourth and Ninth.

At a November 28, 1989 hearing, Federal District Court Judge Nicholas J Bua[9] stated: (transcript page 5)

> "The only relief you can get is by way of mandamus * * * or they do it sua sponte up there. What you do is appeal, and they say, 'Well, it's not an appealable order, but we don't like what the judge did downstairs, and we now will invoke our supervisory powers, and we'll mandamus."

Hearing (January 24, 1990, page 6 Transcript):

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9 Judge, United States District Court, Northern District of Illinois, Eastern Division

"THE COURT: Mr. Whitmer, what I said was that the last time the Seventh Circuit issued a petition for writ of mandamus, it happened to go up in the guise of an appeal, and they said, "No, it's not an appealable order, but based on our supervisory powers, we will sua sponte grant the relief by way of mandamus." * * * The case is just diametrically opposed to two other Circuits, and had the plaintiff appealed that case to the Supreme Court, they would have been mandated to take it because there is a split in the Circuits."

Considering Judge Bua's statements and the Court of Appeals for the Seventh Circuit's denial of such action, there is also a modest conflict within the circuit.

This case also involves toxic torts

Toxic torts are significantly different than other actions in that the defendants totally control any and all information as to the toxic exposures, their duration, and their intensity. It is the very knowledge that plaintiffs need, and that defendants deny to them. It is what community and worker *"right to know"* acts are about.

It is far worse than a motor vehicle accident—for in that case you know whether it was a motorbike, automobile, or a heavy truck. The mass of the vehicle affects the injury itself—and is known. In a toxic tort of this type one can determine some of the toxics, but not the total toxic *"soup,"* its composition, synergisms, and time dose responses.

We know that automobile exhaust gases and carbon monoxide have been transmitted in this all electric building, and that there were two electrical transformer explosions. One in 1970, and another in 1980 involving PCB's and dioxins that there is dangerous, deteriorating, friable, loose asbestos in each apartment according to the 1989 U S Environmental Protection Agency investigation, and that encapsulated diazinon and other pesticides were used in unventilated storage areas.

Defendants' control of toxic data denies Plaintiffs access to medical care

Denial of discovery by the defendants controls access to proper medical treatment. Some physicians treat only massive single exposures, while other physicians treat chronic moderate or low level exposures. Even the consequences and treatments can differ. If defendants' denial of information is successful, it results in a constitutional violation of due process and misconduct constituting obstruction of justice. Exactly what has happened here—even to a destruction of evidence.

Plaintiffs have tried patiently since 1979 to discover what has caused their injuries and continuing illnesses. That is now some eleven years.

Meanwhile the defendants have had massive discovery of plaintiffs' data and even of their consultants'-consultants.

No discovery by plaintiffs

Beginning with the state court cases and now in federal court, petitioners have waited since 1982 for any health or pollutant discovery. They also have not been allowed venue discovery.

Further poisoning, injury, and threats

Petitioner Frank L Whitmer was also very seriously ill during this period, having been dangerously and illegally exposed to non-automotive exhaust fumes and carbon monoxide levels violating all health standards (as high as 141 parts per million) in the John Hancock Center garage. He has still not recovered. This occurred on May 17, 1989 while taking physical samples under a motion to preserve evidence. The readings were taken and recorded by the Certified Industrial Hygienist doing the physical sampling.

Petitioner Frank L Whitmer was again seriously exposed to one of the most dangerous poisons in our society—his systems reacted severely—and since that date he has been unable to regain his original base health readings even though he has been prescribed a significant oxygen supplement of

five liters per minute. His cardiologist, Dr William K Lee, has stated to the Federal District Court several times "*any exposure would be potentially dangerous; possibly fatal or totally disabling.*"

This United States Supreme Court can take judicial notice that people such as petitioner Frank L Whitmer with cardiovascular and respiratory conditions are one of the specially protected classes under all of the Federal, State of Illinois, and City of Chicago pollution standards. They are advised to avoid any exposures exceeding the protective minimums.

Special monitoring equipment indicates that in spite of his Constant Positive Air Pressure *"breathing machine,"* with a considerable five liter flow of oxygen, petitioner's blood oxygen transport is seriously desaturating, and his apnea has changed drastically since this last toxic exposure. If this desaturation should continue or increase, his body systems would collapse.

At the instructions of his cardiologist, petitioners made an emergency appointment with the Mayo Clinic Sleep Clinic and notified the Federal District Court of this crisis on March 14, 1990 by asking for a stay and rescheduling.

Instead of responding to the health emergency, the Federal District Court set an answer by the defendants and then a reply by the petitioners through April 10.

Petitioners notified the Federal District Court of their extension of time by this United States Supreme Court to petition for writ of certiorari but the trial court's only response was to set a conflicting hearing by a magistrate.

Now it is mid-June, fully ninety days later that petitioner Frank L Whitmer has been denied critical medical evaluation and care.

Plaintiff should not be required to permit defendants he charges with injuring him, to monitor and control his health and treatment, particularly when common sense indicates that the last exposure could have been intentional.

As petitioner Frank L Whitmer stated in open court on May 16, 1989, defendants have threatened him in the past. *"if you want to keep your health, drop the suit."* Transcript, page 14. Of course defendants deny any such statements. Lawyers usually don't threaten publicly. A clear indication of defendants' attitude is their statement in a response, *"It is clear that he either value the litigation more than he values his health, or that his health problems truly do not significantly impair his ability to devote his time to this litigation."*

Quoting from another defendant's response of July 18, 1989, *"the plaintiff voluntarily and unnecessarily exposed himself to conditions which he claims make him ill."*

Defendant's attorney conveniently forget that defendant's two *"experts"* were accompanied by their attorney throughout, and that petitioner Frank L Whitmer had to fight to get them to comply with the magistrate's decision to allow sampling of the elevator emergency vestibules and asbestos.

The fumes were not from automobiles—but were from non-automotive cleaning equipment. Also, on January 11, 1984 the transcript on page 5 quotes the lead attorney for John Hancock Mutual Life Insurance Company, describing the agreed new garage carbon monoxide monitoring levels equipment, and turn on procedures"

"monitors will be in use from the alarm . . . thirty-five parts per million When the alarm sounds . . . the fans will then be turned on and the experience is the fans will quickly bring the level down to just a few parts per million."

Toxic discovery denial by defendants

Petitioners' selection of venue, under the Racketeer Influenced and Corrupt Organizations Act (RICO) offering special venue provisions, was determined by their need to avoid further pollutant exposures.

Petitioners' complaint itself detailed and defendants had almost complete discovery of our and our physicians records. Defendants were thereby well aware of our health needs.

When ordered to appear in Chancery Division of the Circuit Court of Cook County in the predecessor state case (82 CH 7453), petitioner Frank L Whitmer explained that he and his physicians had insisted on toxic time and dose data.

The transcript of December 2, 1985 (pages 9-10) shows the Court's response was:

The Court: The dollar amount is satisfactory. There are a lot of other open items that you want included. One of them is a declaration and an identify of what you've been exposed to.

Mr Whitmer: Yes.

The Court: How would you know that it's accurate? I mean, say you get a statement. Would you accept their opinion as to what you were exposed to?

Mr Whitmer: I think that there could be proper testing samples taken too. We tried to stop a very rare cleaning circumstance where in essence they were destroying evidence, and I called it to Mr Ring's office's attention, and he said he wouldn't even take it up with you.

The Court: See, that's a problem.

Mr Whitmer: Yes.

Transcript (pages 17-19) shows a defendants' explanation :

Mr Berzock: Now, there is certain relief that is appropriate to the lawsuit originally brought by the city. . . .

Mr Berzock: There's certain relief that might be appropriate here.

Mr Whitmer: Yes.

Mr Berzock: The relief that's appropriate here turns out to be money. The relief that is appropriate there turns out to be various agreements and settlements on construction and so on and so forth.

Petitioners contend that this petition for writ of certiorari is a matter of their life or death and health.

On June 12, 1990 petitioners were given the word—no more stays in this case, going to move it.

Ninety days to do all of the 250 pages of twelve motions to dismiss and for summary judgment, to obtain any necessary discovery and to complete all medical treatment.

Apparently a civil pro se plaintiff has fewer rights than a convicted criminal—and in this case the criminal is also put in control of the victim's life.

Power of supervison

United States Supreme Court Rule 10(a) states:

"(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; . . . or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

Petitioners ask this Court to exercise its power of supervision and started the certiorari process with as long ago as April 6. It isn't a very reassuring picture.

CONCLUSION

Petitioners ask that this Court issue its petition for a writ of certiorari to the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

Frank L Whitmer and Joan P Whitmer
American Citizens on their own behalf, *Petitioners*
221 Pardridge Place, DeKalb IL 60115, 815/758-7272
15 June 1990

APPENDIX: **A-D**

Order of Court of Appeals
dated December 14, 1989 A1-2

Order of Court of Appeals
dated December 14, 1989 B3-4

Order of Court of Appeals dated January 16, 1990
denying Petition for Rehearing C5-6

Memorandum Opinion and Order of the
District Court dated October 2, 1989 D7-16

Order of the District Court
dated October 26, 1989 E17-19

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

December 14, 1989

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge

No. 89-3241

FRANK L. WHITMER	)	Appeal from the
and JOAN P. WHITMER	)	United States
Plaintiffs-Appellants	)	District
	)	Court for the
	)	Northern District
vs.	)	of Illinois
	)	Western Division
	)	
JOHN HANCOCK	)	
MUTUAL LIFE	)	
INSURANCE COMPANY,	)	87 C 20306
et al	)	Judge: Stanley J
Defendants-Appellees	)	Roszkowski

This matter comes before the court for its consideration of the following documents:

1. "MOTION TO DISMISS" filed herein on November 1, 1989 by counsel for the appellees, General Parking Corporation.
2. "CIRCUIT RULE 3(c) JURISDICTIONAL STATEMENT" filed herein on November 13, 1989 by the pro se appellants.

On consideration thereof,

IT IS ORDERED that this appeal is DISMISSED. Appellants seek to appeal from the district court's order, entered October 2, 1989, transferring their cause of action to the Eastern Division of the Northern District of Illinois from the Western Division. The district court's order is not appealable as of right, pursuant to 28 U.S.C. sec. 1291, because the order does not dispose of the case, nor is the order appealable as a collateral order. See, e.g., Jesko v United States, 713 F.2d 565, 567 (10th Cir. 1983). Further, the district court's order is not appealable as an interlocutory order because the district court denied certification which is required, pursuant to 28 U.S.C.. sec 1292(b). Instead, a petition for writ of mandamus is the appropriate avenue for reviewing an order denying or granting a motion for transfer before final judgment is entered. See, e.g., Butterwick Co. v Will, 316 F.2d 111 (7th Cir. 1963). Appellants have not filed such a petition with this court. Accordingly,

IT IS ORDERED that the MOTION TO DISMISS is GRANTED and this appeal is hereby DISMISSED.

IT IS FURTHER ORDERED that any other relief sought by appellants in connection with this appeal is hereby DENIED.

APPENDIX B—3

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

December 14, 1989
(second of two orders)
Before

Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge

No. 89-3478

FRANK L. WHITMER	)	Appeal from the
and JOAN P. WHITMER	)	United States
Plaintiffs-Appellants	)	District
	)	Court for the
	)	Northern District
vs.	)	of Illinois
	)	Western Division
	)	
JOHN HANCOCK	)	
MUTUAL LIFE	)	
INSURANCE COMPANY,	)	87 C 20306
et al	)	Judge: Stanley J
Defendants-Appellees	)	Roszkowski

This matter comes before the court for its consideration of the following documents:

1. "CIRCUIT RULE 3(c) JURISDICTIONAL STATEMENT: filed herein on December 6, 1989 by the pro se appellants.
2. "MOTION TO CONSOLIDATE" filed herein on December 6, 1989 by the pro se appellants.

On consideration thereof,

IT IS ORDERED that this appeal is DISMISSED for lack of jurisdiction. Appellants seek review of the district court's order, dated October 26, 1989, denying certificate of an interlocutory appeal pursuant to 28 U.S.C. 1292(b). An order denying certification is not appealable, In Re Master Key Antitrust Litigation, 528 F.2d 5,8, (2d Cir. 1975), nor is mandamus an appropriate vehicle for review, Green v Occidental Petroleum Corp, 541 F2d 1335, 1338 (9th Cir. 1976). Therefore, we lack jurisdiction to review the district court's order.

IT IS FURTHER ORDERED that MOTION TO CONSOLIDATE IS DENIED.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

January 16, 1990

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge

No. 89-3241

FRANK L. WHITMER	)	Appeal from the
and JOAN P. WHITMER	)	United States
Plaintiffs-Appellants	)	District
	)	Court for the
	)	Northern District
vs.	)	of Illinois
	)	Western Division
	)	
JOHN HANCOCK	)	
MUTUAL LIFE	)	
INSURANCE COMPANY,	)	87 C 20306
et al	)	Judge: Stanley J
Defendants-Appellees	)	Roszkowski

This matter comes before the court for its consideration of the MOTION TO EXTEND TIME FOR FILING PETITION FOR REHEARING/RECONSIDERATION OF DECEMBER 14, 1989 ORDERS INVOLVING SUBSTANTIAL CONSTITUTIONAL ISSUES IN APPEALS 89-3241 AND 89-3478, filed December 27, 1989, by appellants.

We construe appellants' filing initially as a motion to reconsider our orders dated December 14, 1989, in which we dismissed both appeals for lack of jurisdiction. After careful review of the relevant filings,

IT IS ORDERED that appellants' motion to reconsider is DENIED.

IT IS FURTHER ORDERED that appellants' motion to stay the mandate is hereby DENIED.

IT IS FINALLY ORDERED that any other relief sought in connection with this filing is DENIED. We note that appellants may still file a petition for writ of mandamus challenging the district court's denial of their motion for transfer in this court.

APPENDIX D—7

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

FRANK L. WHITMER	)	Appeal from the
and JOAN P. WHITMER	)	United States
Plaintiffs-Appellants	)	District
	)	Court for the
	)	Northern District
vs.	)	of Illinois
	)	Western Division
	)	
JOHN HANCOCK	)	
MUTUAL LIFE	)	
INSURANCE COMPANY,	)	87 C 20306
et al	)	Judge: Stanley J
Defendants-Appellees	)	Roszkowski

MEMORANDUM OPINION AND ORDER

This action comes before the Court on plaintiff's objections to the Magistrate's Report and Recommendation dated April 12, 1989, transferring this cause to the Eastern Division of the Northern District of Illinois. For the reasons set forth in the opinion below this Court adopts both the holding and the reasoning of the Magistrate's Report and Recommendation with the following additions and discussion.

APPENDIX D—8

1. BACKGROUND

Plaintiffs have sued numerous defendants seeking to recover damages due to the inadequate ventilation in plaintiff's condominium apartment located in the John Hancock Center in Chicago, Illinois. Plaintiffs claim that the installation of the building's ventilation system was in violation of the Building Code of the City of Chicago and proximately caused plaintiffs' health problems. Plaintiffs further allege that the seventeen named defendants conspired to conceal from them the inadequacy of the building's ventilation system. Plaintiffs bring their action under the Racketter (sic) Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 1964, and 1965, the Civil Rights Act, 42 U.S.C. § 1983, various provisions of the United States Constitution, the Illinois Constitution, Illinois law and the Municipal Code of the City of Chicago. Plaintiffs allege that the defendants have committed fraud, fraudulent concealment, negligence, breach of implied warranty, nuisance, trespass and intentional infliction emotional distress.

Plaintiffs currently reside in the City of DeKalb, Illinois which is located in the Western Division of the Northern District of Illinois. The condominium apartment and the John Hancock Building in which the condominium is located are situated in Chicago, Illinois in the Eastern Division of the Northern District of Illinois.

Eleven of the seventeen named defendants are Illinois enterprises. All eleven of those Illinois enterprises have their principal place of business in Chicago, Illinois in the Eastern Division. The City of

Chicago itself, an Illinois municipal corporation, is also a named defendant. The five remaining defendants are foreign corporation registered to do business in the State of Illinois and therefore amendable to suit in any district court in the State of Illinois pursuant to 28 U.S.C. § 1391(c).

II. DISCUSSION

Rule 72(a) of the Federal Rules of Civil Procedure states as follows:

> (a) Nondispositive matters. A Magistrate to whom a pretrial matter not dispositive of a claim or defense of a party is referred to hear and determine shall promptly conduct such proceedings as are required and when appropriate enter into the record a written order setting forth the disposition of the matter. The district judge to whom the case is assigned shall consider objections made by the parties, provided they are served and filed with 10 days after the entry of the order, and shall modify or set aside any portion of the magistrate's order found to be clearly erroneous or contrary to law.

Fed. R. Civ. P. 72(a) (emphasis added). Therefore, the standard of review under which this Court operates in the instant matter is whether the Magistrate's Report and Recommendation of April 12, 1989 is "clearly erroneous or contrary to law." This Court finds that the magistrate's order is neither.

The applicable venue statute states as follows:

> For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

28 U.S.C. § 1404(a). This statutory section sets up a two-pronged test for determination of the appropriateness of any transfer - - whether interdivisional or interdistrict. First, the Court must determine whether the action could have been brought in the division or district where the transferee court lies; second, the Court must determine whether the factors set out in the statute have been satisfied.

This court holds that the first prong of the § 1404 test is satisfied in this case. Plaintiffs could have properly brought this action in either the Eastern Division or the Western Division of the Northern District of Illinois. Since all the named defendants either reside in the Eastern District for venue purposes or are foreign corporation amendable to suit in the Eastern Division, venue would be proper in that division. Further, since all plaintiffs reside in DeKalb, Illinois in the Western Division, venue is likewise proper in this Court. Therefore, venue is proper in both the transferor and the transferee court as required under 28 U.S.C § 1404(a). See *Carpenter v Eticam*, 644 F. Supp. 396, 397 (N.D. Ill. 1987).

In addition to venue being proper in the transferor and transferee court, § 1404(a) sets out three factors which must be weighed in determining the propriety of a transfer pursuant to that statutory section: the convenience of the parties; the convenience of the witnesses; and the interest of justice. Each of these

factors must be weighed in determining the appropriateness of a transfer - - and each of these factors must be weighed in determining whether the magistrate's order was "clearly erroneous or contrary to law."

A. Convenience of the Parties

It this cause of action remains in the Western Division, the defendants will clearly be inconvenienced as all of the defendants are either residents of the Eastern Division for venue purposes or are foreign corporations amenable to suit in any forum in the State of Illinois. In addition, all of defendants' respective counsel are from Chicago, Illinois in the Eastern Division and the situs of the occurrence of the alleged acts as in Chicago, Illinois in the Eastern Division. The residency of the defendants clearly mitigates in favor of the transfer.

Plaintiffs argue that transfer would severely inconvenience them as plaintiff Frank L. Whitmer has a medical condition which he contends effectively precludes his full participation as pro se counsel should the cause be transferred. In support of plaintiffs' contention, however, plaintiffs have failed to produce any affidavits or expert medical testimony which sufficiently supports plaintiffs' contention that he will be effectively precluded from meaningful participation.[1] Defendants,

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1 The Court notes that plaintiffs have provided the court with two affidavits from Drs. Lee and Lotan, both of DeKalb, Illinois. However, these affidavits were not provided to the Court in a timely manner and, therefore, have not been weighed in the instant motion to transfer venue. Some explanation of the procedural history regarding this motion is warranted in explaining the decision not to take plaintiffs' affidavits into account. **Footnote 1 continued next page.**

Footnote 1 continued:

On April 12, 1989, Magistrate P. Michael Mahoney handed down his Report and Recommendation, giving each party the customary ten days to file any objections. On April 26, 1989, plaintiff filed a motion to enlarge the time for filing his objections to and including May 19, 1989. This motion was granted on April 26, 1989. On May 16, 1989, plaintiff again moved this Court to grant an enlargement of time for filing objections under Fed. R. Civ. P. 6(b)(1). Defendants filed objections to this second enlargement of time and a hearing was held on May 31, 1989. Pursuant to a minute order, this Court granted plaintiffs' motion for an extension up to and including June 19, 1989. That minute order noted that if no objections were filed by that time, the matter would be ruled upon without benefit of briefing. On June 28, 1989, nine days after the objections were supposed to have been filed with this Court, plaintiff filed a motion for enlargement of time to file objections to and including June 28, 1989. That motion was taken under advisement by the Court following defendants' objections and on June 29, 1989, plaintiffs finally filed their objections to the Magistrate's Report and Recommendation. Defendants timely filed their responses on July 19, 1989 and the matter was considered fully briefed and ready for ruling. On July 13, 1989, plaintiff filed a motion for leave to file a reply brief. At a hearing on July 18, 1989 this Court denied plaintiffs' motion to file a reply brief. Then, on July 21, 1989, plaintiff filed, without leave of Court, the affidavits in question from the two treating physicians, Drs. Lee and Lotan. Even taking into account the fact that these plaintiffs are representing themselves pro se, a party does not need to be an attorney to understand the meaning of the phrase "no more extensions." That was the clear message from this Court both at the status hearing on May 31, 1989 and in the minute order dated June 1, 1989. In addition, this Court made it clear to plaintiffs that no more filings were necessary or warranted or wanted following defendants' reply brief. And then, just three days after the Court's admonitions about filing, the plaintiffs filed their doctors' affidavits.

This time-line is even more incredible when juxtaposed against the fact that at least one defendant's motion to transfer venue was on file in this Court on March 15, 1988.

The Court further notes, however, that even if these two affidavits were taken into account regarding the instant motion to

for their part, have pointed to a number of instances where plaintiff has, in fact, traveled to Chicago for various appearances and discovery matters. Plaintiffs' failure to support their assertions with affidavits and/or expert medical testimony comes despite the fact that this case is over two years old and the fact that numerous and lengthy extensions were granted plaintiffs in order to file their objections to the Magistrate's Report and Recommendation.[2] Additionally, plaintiff currently resides in DeKalb, Illinois, a community situated almost equidistant from Rockford, Illinois and Chicago, Illinois, the respective sites of the federal courthouses for the Western and Eastern Divisions. The inconvenience that a few extra minutes of travel which my be occasioned by a transfer to Chicago may cause is, in this Court's view, de minimus.

On balance, this Court has little difficulty in concluding that the inconvenience, expense and hardship to defendants which would accompany a trial of this case in Rockford, Illinois far outweighs the de minimus

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transfer venue, the result would be the same. The affidavits provided to this Court by plaintiffs explain the mere possibility of some harm due to some unknown agent which might be in the air either in the Chicago area or in the Hancock building. Considering the amount of time the plaintiffs have had to obtain discovery and prepare this particular affidavit, the fact they they recite mere possibilities based on medically unsubtantiated hypotheses leads this Court to accord them minimal weight. Therefore, even if this Court had considered the affidavits of Dr. Lee and Lotan in considering the magistrate's report and recommendation transferring this case to the Eastern Division, the result would have been the same - - the case should be transferred.

2 See supra note [1] for a recitation of the procedural history of the instant motion to transfer venue.

inconvenience and hardship to plaintiffs which would accompany a transfer of this case to the Eastern Division.

B. Convenience of the Witnesses

Not only are all of the defendants residing in or amendable to suit in the Eastern Division, all of the defendants' witnesses in this case are from Chicago. In addition, the plaintiffs' condominium and the John Hancock Center, wherein the plaintiffs' condominium sits, are in Chicago. The Court notes that there are twenty-nine attorneys listed as counsel for the various defendants in this case. This Court assumes that presumably, there will be witnesses presented by each of seventeen defendants relating to their respective liability in this action, and while the Court would not presume to be accurately reflecting the parties' intent prior to any disclosure of how many witnesses or how long this trial may take, suffice it to say that this Court believes that over twenty-five witnesses could reasonably be expected in trial of this matter.

Presumably, plaintiffs' treating physicians for trial purposes will be Drs. Lee and Lotan from DeKalb, Illinois and a treating physician from the Mayo Clinic in Rochester, Minnesota. While it may not matter to the doctor from the Mayo Clinic whether he must travel to Rockford or to Chicago, logistically it will probably be more convenient for that doctor to have the trial in Chicago due to ease of transportation into Chicago. In addition, as noted above, DeKalb is nearly equidistant from Rockford and Chicago and any inconvenience suffered by these witnesses would be negligible if at all. Therefore, no consequential inconvenience will result to

plaintiffs' witnesses if this cause is transferred to the Eastern Division in Chicago.

C. The Interest of Justice

Because this case involves an intradistrict transfer as opposed to an interdistrict transfer, the interest of justice factor appears to be less relevant as there are no conflict of law questions or issues relating to the forum court's familiarity with the law or circumstances. Instead, this Court believes that the first two factors discussed above provide the relevant framework for a discussion of the interest of justice.

So long as this case can be tried in the least inconvenient and least expensive forum to the respective parties, this Court believes that the interest of justice is being served. Either division's legal mechanism could adequately try this case - - however, because of the factors discussed above, the Eastern Division provides the most convenience and most logical forum for resolution of this dispute.

This Court further adds that it has been a longstanding reciprocal policy, albeit an unwritten one, to transfer cases from the Western Division to the Eastern Division, or the reverse, on balance when handling all the proceedings in one or the other division proves to be most convenient for all the parties, witnesses and in the interest of justice, and does not conflict with some applicable venue statute such as 28 U.S.C. § 1391.

III. CONCLUSION

For the foregoing reasons, this Court hereby adopts both the holding and the reasoning of the Magistrate's Report and Recommendation dated April 12, 1989 with the additions and discussions contained herein. This cause is hereby transferred to the Eastern Division of the Northern District of Illinois and all pending motions and matters pertaining to this case must be brought before the transferee court.

ENTER:
signed/
STANLEY J ROSZKOWSKI, JUDGE
UNITED STATES DISTRICT COURT

DATED: October 2, 1989

APPENDIX E—17

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

FRANK L. WHITMER	)	Appeal from the
and JOAN P. WHITMER	)	United States
Plaintiffs-Appellants	)	District
	)	Court for the
	)	Northern District
vs.	)	of Illinois
	)	Western Division
	)	
JOHN HANCOCK	)	
MUTUAL LIFE	)	
INSURANCE COMPANY,	)	87 C 20306
et al	)	Judge: Stanley J
Defendants-Appellees	)	Roszkowski

ORDER

This cause comes before the Court upon plaintiff's motion to correct the record, plaintiff's motion for certification of an interlocutory appeal, plaintiff's motion for stay pending appeal and plaintiff's oral motion requesting a stay of the transfer of the court file to the Eastern Division.

For the reasons set forth below, the plaintiff's motion to correct the record is granted to the extent the Clerk's office verified that the documents were file stamped; plaintiff's motion for certification of an

interlocutory appeal is denied; plaintiff's motion for stay pending appeal is denied; and plaintiff's oral motion to stay transfer of the court file is denied.

DISCUSSION

The Court's order dated October 2, 1989, transferring venue in this case to the Eastern Division of the Northern District of Illinois is clearly a non-appealable order. As such, this Court is not divested of jurisdiction. See United States v Bastanipour, 697 F.2d 170, 173 (7th Cir. 1982).

Plaintiff represents that there are documents which were, in fact, file stamped by the Clerk's office but never included in the court file or on the docket sheet. To the extent these representations are verified by the Clerk's office, the motion is granted.

Plaintiff's motion for certification of an interlocutory appeal is denied as the plaintiff's have failed to make the requisite showing pursuant to 28 U.S.C. §1292(b). The statute allows for certification when the district court concludes that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation . . . ." It is this Court's opinion that the venue question involved here neither involves a controlling question of law nor will an interlocutory appeal materially advance the ultimate termination of this litigation. The resolution of the venue issue involved here is discretionary with the trial court and involves no question of law. Certification will only

hinder and delay the ultimate resolution of this case, not materially advance such resolution.

This action has been transferred to the Eastern Division and no interlocutory appeal has been certified here. Pursuant to the language of 28 U.S.C. §1292(b), there appears to be a presumption against granting a stay unless otherwise ordered by the district court or the appellate court. We see no reason to stay the proceedings and, therefore, deny plaintiff's motion. Should the interlocutory appeal be certified at some future time by the transferee court, this court believes that the application for stay would properly be brought before that transferee court. With the transfer of the case necessarily follows the transfer of the court file. Plaintiff's motion, is therefore, denied.

CONCLUSION

For the reasons set forth in the Order above, this Court grants plaintiffs' motion to correct the record insofar as the errors can be ascertained by the Clerk's office. Further, this court denies plaintiffs' motions for certification of an interlocutory appeal, for stay pending appeal and for a stay of the transfer of the court file to the Eastern Division.

ENTER:
signed/
STANLEY J ROSZKOWSKI, JUDGE
UNITED STATES DISTRICT COURT

DATED: October 26, 1989

No. 89-1984

Supreme Court, U.S.
FILED
JUL 17 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FRANK L. WHITMER and JOAN P. WHITMER,

Petitioners,

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE CO., SKIDMORE, OWINGS AND MERRILL, SUDLER AND CO., SUDLER MARLING, INC., TISHMAN CONSTRUCTION CO., ALUMINUM COMPANY OF AMERICA, ADMIRAL HEATING AND VENTILATING, INC., R.B. HAYWARD CO., UNIVERSAL SHEET METAL CORP. d/b/a UNIVERSAL-HAYWARD, CUPPLES PRODUCTS CORPORATION, a DIVISION OF H.H. ROBERTSON CO., H.H. ROBERTSON CO., 175 EAST DELAWARE PLACE HOMEOWNERS ASSOCIATION, H.S. NACHMAN AND ASSOCIATES, INC., ENVIRONMENTAL SYSTEMS DESIGN, INC., L.C. KOHLMAN, INC., GENERAL PARKING CORPORATION, WILSON & McILVAINE, CITY OF CHICAGO, and DOES 1-50 INCLUSIVE,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

Whether there is a conflict among the U.S. Courts of Appeals on the question of whether a Court of Appeals should treat an appeal from an order granting a motion for transfer of venue under 28 U.S.C., §1404(a) as a petition for writ of mandamus where all U.S. Courts of Appeals that have addressed the issue have held that it is within a Court of Appeals' discretion whether a notice of appeal from an unappealable order should be treated as a petition for writ of mandamus.

Whether an order granting a motion for transfer of venue under 28 U.S.C., §1404(a) for the convenience of the parties and witnesses and in the interest of justice is appealable where such order is neither final, nor appealable, nor a "collateral order" as defined in *Cohen v. Beneficial Finance Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 98 L.Ed. 1528 (1949).

LIST OF PARTIES

Respondents John Hancock Mutual Life Insurance Company and Sudler and Co., now known as Sudler Marling, Inc. are the same parties as those listed in the caption to the Petitioners' Petition.

Respondent John Hancock Mutual Life Insurance Company states, pursuant to U.S. Supreme Court Rule 29.1, that it has the following non-wholly owned subsidiaries:

John Hancock Services Internacionsis S/C Limitada

John Hancock International Services, S.A.

The Maritime Life Assurance Co.

John Hancock International Services (Hong Kong) Ltd.

Nahama & Weagant Energy Co.

P.T. Asuransi Pensiun Bumiputera John Hancock

AHP Acquisition Corp.

British American Life & General Insurance Berhad

K&N Kenanga SDN, Bhd.

First Signature Bank & Trust Co.

Energy Investors Management, Inc.

JHM Capital Corp.

Capital Growth (Bermuda) Mngmt. Co., Ltd.

John Hancock Advisers International, Ltd.

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Bridge C.A.T. Scan Associates v. Technicare Corp., 710 F.2d 940 (2d Cir. 1983) 8

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D'Ippolito v. American Oil Co., 401 F.2d 764 (2d Cir. 1968) 10

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Gardiner v. A.H. Robins Co., Inc., 747 F.2d 1180 (8th Cir. 1984) 9

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Southern Pacific Transportation Company v. San Antonio Texas, 748 F.2d 266 (5th Cir. 1984) .. 9

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FRANK L. WHITMER and JOAN P. WHITMER,

Petitioners,

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE CO., SKIDMORE, OWINGS AND MERRILL, SUDLER AND CO., SUDLER MARLING, INC., et al.,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondents, John Hancock Mutual Life Insurance Company and Sudler and Company, now known as Sudler Marling, Inc., respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the Court of Appeals for the Seventh Circuit's three orders in this case. The Court of Appeals' orders: (1) dismissed the Petitioners' appeal from an order of the U.S. District Court, Northern District of Illinois, Western Division, transferring Petitioners' cause of action to the Eastern Division; (2) dismissed the Petitioners' appeal from the order of the U.S. District Court, Northern District of Illinois, Western Division, denying certification of an interlocutory appeal pursuant to 28 U.S.C., §1292(b); and (3) denied Petitioners' motion for reconsideration of the two previous orders.

OPINIONS BELOW

The Court of Appeals issued two orders on December 14, 1989. The first order dismissed the Petitioners' appeal from the order of the U.S. District Court, Northern District of Illinois, Western Division, dated October 2, 1989, transferring venue of Petitioners' cause of action from the Western Division to the Eastern Division of the Northern District (Petitioners' Appendix A, 1-2). The Court of Appeals held that the District Court's order transferring venue was not appealable as of right. The order further stated that a petition for writ of mandamus is the appropriate avenue for reviewing an order denying or granting a motion for transfer before final judgment is entered.

The Court of Appeals' second December 14, 1989 order dismissed for lack of jurisdiction the Petitioners' appeal from the order of the U.S. District Court, Northern District of Illinois, Western Division, dated October 26, 1989, denying certification of an interlocutory appeal pursuant to 28 U.S.C., §1292(b) from the Western Division's order transferring venue to the Eastern Division (Petitioners' Appendix B, 3-4).

The Court of Appeals' third order, dated January 16, 1990, denied the Petitioners' motion to reconsider both of the Court of Appeals' two December 14, 1989 orders (Petitioners' Appendix C, 5-6). In its January 16, 1990 order, the Court of Appeals again noted that the Petitioners may still file a petition for writ of mandamus.

Petitioners never filed a petition for writ of mandamus with the Court of Appeals.

The order of the U.S. District Court for the Northern District of Illinois, Western Division, dated October 2, 1989, transferred Petitioners' cause of action to the Eastern Division of the U.S. District Court for the Northern District of Illinois (Petitioners' Appendix D, 7-16). The U.S. District Court for the Northern District of Illinois, Western Division's order dated October 26, 1989 denied Petitioners' motion for certification of an interlocutory appeal, denied Petitioners' motion for a stay pending appeal and denied Petitioners' oral motion to stay transfer of the court file to the Eastern Division (Petitioners' Appendix E, 17-19).

None of the Court of Appeals' or District Court's orders are reported.

JURISDICTION

The orders of the Court of Appeals were entered on December 14, 1989. Rehearing was denied on January 16, 1990, and the Petitioners' Petition for Writ of Certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C., §1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C., §1651. Writs

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principals of law.

28 U.S.C., §1404(a). Change of Venue

> (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

STATEMENT OF THE CASE

A. Procedural Background Of The Litigation.

Petitioners Frank and Joan Whitmer purchased a condominium on the 85th floor of the John Hancock Center, located in downtown Chicago, Illinois, on August 30, 1977. Petitioners filed this federal suit in the U.S. District Court, Northern District of Illinois, Western Division (Rockford, Illinois) on June 10, 1987. Petitioners filed a First Amended Complaint on February 3, 1988. The First Amended Complaint consists of 65 pages and requests damages and equitable relief for illnesses which the Petitioners claim were caused by air pollutants. The First Amended Complaint attempts to allege claims based on federal jurisdiction under the U.S. Constitution and the Bill of Rights, RICO (18 U.S.C., §1961, *et seq.*), and 42 U.S.C., §1983, *et seq.*, as well as state claims under

pendent jurisdiction for civil conspiracy, fraud, fraudulent concealment, claims under the Illinois Consumer Fraud and Deceptive Practices Act (*Ill. Rev. Stat.* ch. 121½, §261 *et seq.*), negligence, implied warranty, nuisance, trespass, intentional infliction of emotional distress and injunction against 17 named defendants and DOES 1-50.

Prior to the filing of this federal suit, on August 31, 1982 Petitioner Frank Whitmer filed a separate lawsuit in the Circuit Court of Cook County, Illinois, against Respondents regarding his alleged medical problems. The Circuit Court of Cook County is located in downtown Chicago, Illinois. Petitioner Frank Whitmer voluntarily dismissed this state court action on June 10, 1986, exactly one year prior to the filing of the present federal suit in Rockford.

Also prior to the filing of the present federal suit, Petitioner Joan Whitmer intervened in a lawsuit filed by the City of Chicago against Respondents on July 22, 1983 in the Circuit Court of Cook County. Petitioner Joan Whitmer has been active in appearing in downtown Chicago as a *pro se* intervenor in the City of Chicago lawsuit, both in the Circuit Court and for various appeals before the Illinois Appellate Court, First District.

On October 26, 1989, Judge Stanley Roszkowski of the Western Division of the U.S. District Court, Northern District of Illinois, adopted the holding and reasoning of the U.S. Magistrate, granted all Respondents' motions brought under 28 U.S.C., §1404(a) and transferred this federal suit to the Eastern Division, located in Chicago.

On June 26, 1990, Judge Nicholas Bua of the Eastern Division dismissed this suit for want of prosecution when the Petitioners did not appear for a scheduled status before the court. As of the date of filing of this Response

to Petition for Writ of Certiorari, Judge Nicholas Bua's June 26, 1990 order of dismissal is still in effect, possibly causing Petitioners' Petition for Writ of Certiorari to become moot.

B. Issues Presented By Petitioners Which Are Not Before This Honorable Court.

Petitioners' "Questions Presented" section of their Petition for Writ of Certiorari lists ten questions, only two of which, Question #4 and Question #7, are arguably before this Honorable Court. The only issues arising from the U.S. Court of Appeals for the Seventh Circuit's orders are: (1) whether the Seventh Circuit is required to treat Petitioners' Notice of Appeal as a Petition for Writ of Mandamus; and (2) the unappealability of the order transferring venue. It is unclear to Respondents why Petitioners have filed the present Petition for Writ of Certiorari instead of filing a proper Petition for Writ of Mandamus with the Court of Appeals.

The other "Questions Presented" by the Petitioners are not addressed in the Court of Appeals' orders and, therefore, are not before this Honorable Court. In addition, Petitioners' "Question Presented" #6 is unintelligible.

REASONS FOR DENYING THE WRIT OF CERTIORARI

Petitioners argue many points, only two of which are before this Court and none of which approach the kind of important constitutional or policy question which this Court should exercise its discretion to hear. Furthermore, the only issues before this Court, whether the Court of Appeals should have treated the Petitioners' appeal from the order transferring venue as a petition for writ of mandamus and the unappealability of the order transferring venue, do not present issues which involve a conflict in the decisions of the U.S. Courts of Appeals.

I. There Is No Conflict Among The U.S. Courts of Appeals On The Question Of Whether A Notice Of Appeal From An Unappealable Order Should Be Treated As A Petition For Writ Of Mandamus. All U.S. Courts of Appeals That Have Addressed The Issue Are Uniform In Holding That It Is Within A Court Of Appeals' Discretion Whether The Notice Of Appeal Should Be Treated As A Petition For Writ Of Mandamus.

A review of the decisions of the U.S. Courts of Appeals which have addressed the issue, the Courts of Appeals for the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and Eleventh Circuits, shows that all have held it is within a Court of Appeals' discretion whether a notice of appeal from an unappealable order should be treated as a petition for writ of mandamus.

Since there is no conflict among the Courts of Appeals on this issue, therefore, there is no basis for this Honorable Court to exercise its judicial discretion under Supreme Court Rule 10. Therefore, this Honorable Court should deny the Petitioners' Petition for Writ of Certiorari.

28 U.S.C., §1651(a) provides in part that this Honorable Court and all courts established by Act of Congress "may" issue all writs necessary or appropriate in aid of their respective jurisdictions. The particular U.S. Courts of Appeals and their holdings on this issue are set forth below:

Second Circuit: *Corcoran v. Ardra Insurance Co., Ltd.*, 842 F.2d 31, 35 (2d Cir. 1988) (except where there is a public interest involved, normal practice is to decline to treat improvident appeals as petitions for mandamus). *See also Bridge C.A.T. Scan Associates v. Technicare Corp.*, 710 F.2d 940, 944 (2d Cir. 1983).

Third Circuit: *Nascone v. Spudnuts, Inc.*, 735 F.2d 763, 773 (3rd Cir. 1984) (Court has the discretion to treat an improper claim to an appeal as of right as petition for mandamus); *Cheyney State College Faculty v. Hufstedler*, 703 F.2d 732, 736 (3rd Cir. 1983) (A court "may" treat an attempted appeal of a stay order as a petition for mandamus).

Fourth Circuit: *International Nickel Co. v. Martin J. Barry, Inc.*, 204 F.2d 583, 585 (4th Cir. 1953) (Court of Appeals may treat an attempted appeal as an application for mandamus or at least give leave to the appellant to make application for the writ); *Three J Farms, Inc. v. Alton Box Board Co.*, 609 F.2d 112, 115 (4th Cir. 1979) (Court of Appeals "may" treat an appeal as a petition for writ of mandamus). In the instant case, the Court of Appeals for the Seventh Circuit gave the Petitioners, the Whitmers, leave to make an application for the writ. See Court of Appeals order dated January 16, 1990, Petitioners' Appendix C, 6.

Fifth Circuit: *Huckeby v. Frozen Food Express*, 555 F.2d 542, 549 (5th Cir. 1977) (Court of Appeals possesses

the "discretionary" power to treat an attempted appeal as a petition for mandamus); *United States v. Briggs*, 514 F.2d 794, 808 and n.27 (5th Cir. 1975) (Court of Appeals "may" consider matter as a petition for writ of mandamus); *Southern Pacific Transportation Company v. San Antonio Texas*, 748 F.2d 266, 270 (5th Cir. 1984) (Court has discretion to treat mere appeal as petition for writ of mandamus).

Sixth Circuit: *Hammons v. Teamsters, Chauffeurs, etc., Loc. No. 20*, 754 F.2d 177, 179 (6th Cir. 1985) (Under extraordinary circumstances, mandamus "may" be used to review an unappealable interlocutory order); *Beard v. Carrollton R.R.*, 893 F.2d 117, 120-121 (6th Cir. 1990) (An appeal "may" be treated as a petition and mandamus is a "discretionary" remedy).

Seventh Circuit: *United States v. City of Chicago*, 870 F.2d 1256, 1259 (7th Cir. 1989) (Court of Appeals "could" construe a request in an appeal brief as a petition for mandamus); *Geaney v. Carlson*, 776 F.2d 140, 142-143 (7th Cir. 1985) (Case did not present the "exceptional circumstances" required to warrant the issuance of a writ of mandamus).

Eighth Circuit: *Iowa Beef Processors, Inc. v. Bagley*, 601 F.2d 949, 953, n.3 (8th Cir. 1979) (Emphasized that it will not treat a notice of appeal as a petition for writ of mandamus as a matter of course in every case where questions about appellate jurisdiction are raised. An appeal from an unappealable order "may" be considered as a petition for writ of mandamus where circumstances justify such treatment). *See also Gardiner v. A.H. Robins Co., Inc.*, 747 F.2d 1180, 1188, n.11 (8th Cir. 1984).

Ninth Circuit: *National Organization for the Reform of Marijuana Laws v. Mullen*, 828 F.2d 536, 541 (9th Cir.

1987) (Court of Appeals "may", where appropriate, treat appeals as petitions for mandamus); *Cord v. Smith*, 338 F.2d 516, 521 (9th Cir. 1964) (Where a party attempts to appeal from an unappealable order, and the circumstances justify doing so, the Court of Appeals can, in its discretion, treat the proceedings as a petition under the All Writs Act, 28 U.S.C., §1651); *Young Properties Corp. v. United Equity Corp.*, 534 F.2d 847, 854 (9th Cir. 1976) (Motion to Transfer Venue denied and Court of Appeals though "empowered" to treat the appeal from the denial as a petition for writ of mandamus declines because there was no clear abuse of discretion).

Eleventh Circuit: *Suarez-Valdez v. Shearson Lehman/ American Express*, 858 F.2d 648, 649 (11th Cir. 1988) (Court of Appeals "may" treat an interlocutory appeal as a petition for writ of mandamus).

II. An Order Granting A Motion For Transfer Of Venue Under 28 U.S.C. §1404(a) For The Convenience Of The Parties And Witnesses And In The Interest Of Justice Is Neither Final, Nor Appealable, Nor A "Collateral Order" As Defined In The *Cohen v. Beneficial Finance Loan Corp.* Case.

The U.S. Courts of Appeals are in agreement that orders granting or denying a motion for transfer of venue under 28 U.S.C., §1404(a) for the convenience of the parties and witnesses and in the interest of justice are neither final, nor appealable, nor a "collateral order" as defined in *Cohen v. Beneficial Finance Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949).

See: Kotlicky v. United States Fidelity and Guarantee Co., 817 F.2d 6, 7, n.1 (2d Cir. 1987) (transfer orders under 28 U.S.C., §1404(a) are interlocutory and not appealable); *D'Ippolito v. American Oil Co.*, 401 F.2d 764, 765

(2d Cir. 1968) (order transferring an action pursuant to Section 1404(a) is not appealable and not a collateral order under the *Cohen* doctrine); *McCreary Tire and Rubber Co. v. Ceat S.P.A.*, 501 F.2d 1032, 1034 (3d Cir. 1974) (order transferring an action pursuant to Section 1404(a) or refusing to make such a transfer is interlocutory and unappealable); *Nascone v. Spudnuts, Inc.*, 735 F.2d 763, 764, 772 (3d Cir. 1984) (orders granting or denying motions to transfer under Section 1404(a) are not appealable and are not immediately appealable as collaterally final orders under the *Cohen* doctrine); *In re Ralston Purina Co.*, 726 F.2d 1002, 1005 (4th Cir. 1984) (denial of a motion to transfer under Section 1404(a) is not an appealable order); *Ellicott Machine Corp. v. Modern Welding Co., Inc.*, 502 F.2d 178, 180 (4th Cir. 1974) (decision of a district judge on a motion for change of venue under Section 1404(a) is not appealable as a final judgment); *Stelly v. Employers National Insurance Co.*, 431 F.2d 1251, 1253 (5th Cir. 1970) (order transferring a case under Section 1404(a) is interlocutory and not final); *Wilkins v. Erickson*, 484 F.2d 969, 971 (8th Cir. 1973) (order granting or denying a requested transfer under Section 1404(a) is interlocutory and not appealable); *In re Dalton*, 733 F.2d 710, 714-715 (10th Cir. 1984) (an order transferring venue of an action is an interlocutory order and unappealable and does not constitute an appealable order as part of the *Cohen* collateral order exception); *Dobard v. Johnson*, 749 F.2d 1503, 1507 (11th Cir. 1985) (transfer orders based on *forum non conveniens* determinations brought pursuant to Section 1404(a) are non-reviewable interlocutory orders).

The Petitioners' citation, at page 24 of their Petition, to *Sterling Forest Associates, Ltd. v. Barnett-Range Corp.*, 840 F.2d 249 (4th Cir. 1988), is inapposite. In the *Sterling* case the Purchase Agreement between the parties

contained a mandatory forum selection clause. Furthermore, in *Nascone v. Spudnuts, Inc.*, *supra*, 735 F.2d at 764, 772, the Court of Appeals held that an order transferring venue pursuant to a forum selection clause was not final or appealable as a matter of right or as a collateral order under the *Cohen* case.

CONCLUSION

The only issues before this Honorable Court, whether there is a conflict among the U.S. Courts of Appeals on the issue of whether a notice of appeal from an unappealable order should be treated as a petition for writ of mandamus and the unappealability of an order transferring venue, are plainly without merit. There is no conflict among the U.S. Courts of Appeals.

Furthermore, the Petitioners' Petition suggests that the remedy of a petition for writ of mandamus should be a substitute for an appeal. This is contrary to the holdings of this Honorable Court. This Honorable Court has repeatedly held that the remedy of mandamus may not be used as a mere substitute for appeal. *Will v. United States*, 389 U.S. 90, 97, 88 S.Ct. 269, 274, 19 L.Ed. 2d 305 (1967); *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 382-83, 74 S.Ct. 145, 148, 98 L.Ed. 106 (1953); *Ex parte Fahey*, 332 U.S. 258, 260, 67 S.Ct. 1558, 1559, 91 L.Ed. 2041 (1947).

This Honorable Court has also held that the remedy of mandamus is a drastic one, to be invoked only in extraordinary circumstances, and has traditionally been used in the federal courts only to confine an inferior court to

a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. *Kerr v. United States District Court for the Northern District of California*, 426 U.S. 394, 402, 96 S.Ct. 2119, 2123, 48 L.Ed.2d 725 (1976). The Courts of Appeals' opinions from the Circuits cited above and the Seventh Circuit's action in the instant case are in conformance with this Honorable Court's holding in the *Kerr* case.

The issues raised by the Petition are plainly without merit. The Petition should be denied forthwith.

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CLERK

No. 89-1984

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FRANK L. WHITMER and JOAN P. WHITMER,

Petitioners,

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE CO., SKIDMORE, OWINGS AND MERRILL, SUDLER AND CO., SUDLER MARLING, INC., TISHMAN CONSTRUCTION CO., ALUMINUM COMPANY OF AMERICA, ADMIRAL HEATING AND VENTILATING, INC., R.B. HAYWARD CO., UNIVERSAL SHEET METAL CORP. d/b/a UNIVERSAL-HAYWARD, CUPPLES PRODUCTS CORPORATION, a DIVISION OF H.H. ROBERTSON CO., H.H. ROBERTSON CO., 175 EAST DELAWARE PLACE HOMEOWNERS ASSOCIATION, H.S. NACHMAN AND ASSOCIATES, INC., ENVIRONMENTAL SYSTEMS DESIGN, INC., L.C. KOHLMAN, INC., GENERAL PARKING CORPORATION, WILSON & McILVAINE, CITY OF CHICAGO, and DOES 1-50 INCLUSIVE,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS FOR REVIEW

1. Whether petitioners have a right of appeal from the District Court's change of venue order which transferred their cause of action from the Western Division to the Eastern Division of the Northern District of Illinois.

2. Whether the Circuit Court of Appeals has a duty to treat an improper appeal as a petition for a writ of mandamus.

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JURISDICTION

The Petition for Certiorari does not present this Court with any jurisdictional basis to review the issues stated therein. There is no conflict among the circuits so as to invite review by this Court under Supreme Court Rule 17. Moreover, the Circuit Court has not "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Sup. Ct. R. 17.1(a).

STATEMENT OF THE CASE

On February 3, 1988, petitioners filed their First Amended Complaint naming defendant Wilson & McIlvaine (the respondent herein).[1] The eleven count Complaint attempts to allege numerous causes of action against sixty-eight defendants, including Does 1-50. The Complaint alleged violations of RICO, the Civil Rights Act, and numerous pendent state law claims including fraud, fraudulent concealment, and negligence. All of the allegations related to the design, construction, management, or maintenance of the John Hancock Center, a 100 story commercial, office and residential building constructed in Chicago, Illinois

[1] Petitioners' statement of the case omits and mischaracterizes much of the procedural history in this action. Therefore, respondent, Wilson and McIlvaine, finds it is necessary to present this Court with a short summary of the history of the case. Also, respondent firm's name is now Burke, Wilson & McIlvaine.

in the period of 1965 to 1968. On February 23, 1988, respondent timely entered an appearance and on March 15, 1988, it filed a Change of Venue Motion requesting the District Court to transfer the case from the Western Division to the Eastern Division within the Northern District of Illinois. In addition, on March 25, 1988, respondent filed its Motion to Dismiss the Plaintiffs' First Amended Complaint.

Petitioners' response to the Change of Venue Motion was due on May 13, 1988. After filing eleven Motions for Extension of Time and twelve other motions, the petitioners finally filed a response entitled "Plaintiff's Verified Motion That Action Be Tried in DeKalb, Illinois, Strike, Dismiss, and Sanction Defendant's Motions Rule 12(f) and Sanctions Rule 11, and Response to Defendant's Replies and Motions to Dismiss or Transfer Venue." This Motion was filed on March 21, 1989, approximately one year after the respondent filed its motions to dismiss and transfer venue. On April 12, 1989, the magistrate entered an order recommending to the District Court that venue be transferred from the Western Division to the Eastern Division of the Northern District of Illinois. On October 2, 1989, the District Court adopted the Magistrate's Order and recommendation. On November 15, 1989, the petitioners filed a Notice of Appeal to the Seventh Circuit Court of Appeals and on December 14, 1989, the Seventh Circuit dismissed the appeal. This petition for certiorari followed. On June 26, 1990, the District Court dismissed petitioners' First Amended Complaint with prejudice for want of prosecution. Thus, no underlying cause of action exists as of the date of filing of this response.

SUMMARY OF ARGUMENT

An order transferring venue is interlocutory in nature and not a final order from which an appeal may be taken pursuant to 28 U.S.C. §1291. Therefore, the Seventh Circuit properly dismissed the petitioners' appeal from the District Court's transfer of venue order. In addition, a Circuit Court of Appeals is under no duty to treat an appeal as a petition for a writ of mandamus.

ARGUMENT

A. PETITIONERS HAVE NO RIGHT TO AN APPEAL FROM THE CHANGE OF VENUE ORDER

The District Court's order transferring venue is not a final order that is appealable under 28 U.S.C. §1291. *In Re Dalton*, 733 F.2d 710 (10th Cir. 1984) ("an order transferring venue of an action, even if the transfer is to a district in another circuit is an interlocutory order and unappealable, . . ."), *cert. dismissed*, *Dalton v. United States*, 469 U.S. 1185 (1985); *Nascone v. Spudnuts, Inc.*, 735 F.2d 763 (3d Cir. 1984) ("for many years this court—and virtually every other court—has held that such orders transferring venue are not appealable."). A Circuit Court's jurisdiction under Section 1291 to review a final order "depends on the existence of a decision by the District Court that ends the litigation on the merits and leaves nothing for the Court to do but execute the judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)). The

District Court's order transferring venue in this case from the Western Division to the Eastern Division of the Northern District of Illinois only determines the site for the litigation. This order clearly does not dispose of the litigation on the merits. *See In Re Dalton*, 733 F.2d at 714.

Petitioners have argued that the collateral order doctrine should allow this otherwise impermissible appeal. The collateral order doctrine allows for an appeal under certain circumstances to be taken from an otherwise unreviewable interlocutory order. This Court summarized such requirements, originally set forth in *Cohen v. Beneficial Insurance Loan Corp.*, 337 U.S. 541 (1949), in the following language:

> To come within the "small class" of decisions excepted from the final judgment rule by *Cohen*, the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.

Moses H. Cone Memorial Hosp. v. Mercury Constr. Co., 460 U.S. 1, 11-12 (1983) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)). The court in *In Re Dalton* explicitly refused to apply the collateral order exception to a venue transfer order "even though postponing review forces the would-be appellant to litigate in the forum he seeks to avoid." *In Re Dalton*, 733 F.2d at 715. The court did not consider this to be the type of "irretrievable loss of a collateral right" necessary to satisfy the requirements of *Cohen*. *Id.*

Review of the District Court's conclusion that venue is proper in the Eastern Division of the Northern District of Illinois can be effectively obtained by petitioners' filing a petition for a writ of mandamus as indicated by the

Seventh Circuit's Order dismissing the appeal. While petitioners may be "inconvenienced in the interim," there is no reason why the propriety of the transfer order needs to be considered prior to a final judgment. *See Jesko v. United States*, 713 F.2d 565, 567-68 (10th Cir. 1983). Therefore, application of the collateral order doctrine in this case is precluded and petitioners have no right to an immediate appeal.

Further, petitioners did not present the Circuit Court of Appeals with an "important issue" within the meaning of *Cohen*. While the transfer of venue order may inconvenience petitioners and allegedly poses some risk to their health, it is not a "serious and unsettled question" of general importance beyond the scope of this litigation. *Cohen*, 337 U.S. at 546-47. Allowing appeal from this order would do little to establish meaningful judicial standards. *See Donlon Indus., Inc. v. Forte*, 402 F.2d 935 (2d Cir. 1968) (where the appropriateness of a discretionary order denying security was not "important" within the meaning of the *Cohen* exception.)

B. THE DISTRICT COURT DOES NOT HAVE A DUTY TO TREAT AN IMPROPER APPEAL AS A PETITION FOR A WRIT OF MANDAMUS

Although a Court of Appeals may treat an improper appeal as a petition for mandamus, the exercise of this power is discretionary and does not rise to the level of imposing a duty on the Court. *Nascone v. Spudnuts, Inc.*, 735 F.2d 763, 773 (3d Cir. 1984). The exercise of this discretionary review is predicated on the potential for prejudice to the litigants and the fact that the party seeking relief is barred from all avenues of immediate appeal. *Id.* In *Nascone*, the Third Circuit allowed mandamus review because the transfer order in question was enforcing a

forum selection clause and the transfer involved was from Pennsylvania to Utah. The court stated that "unlike the myriad factual considerations relevant to the exercise of discretion in a standard transfer situation, transfer based on a forum selection clause is particularly suited to appellate review by mandamus." *Id.*

The facts underlying petitioners request to treat their appeal as a petition for mandamus do not present the burdens and complex legal issues involved in *Nascone.* This is a "standard transfer situation" changing venue between divisions within the same judicial district. Therefore, the Circuit Court did not act improperly in refusing to treat the appeal as a petition for mandamus.

The Seventh Circuit takes a more conservative approach. In *Gearney v. Carlson*, 776 F.2d 140, 142 (7th Cir. 1985), the court acknowledged that it could construe an appeal as a petition for mandamus, but refused to take this action. The court found that the case did not present "exceptional circumstances" warranting mandamus relief and appellants had not specified the nature of the relief sought or complied with Federal Rule of Civil Procedure 21(a). *Id.* Thus, the Seventh Circuit has clearly followed its own precedent in dismissing this appeal and directing petitioners to file a petition for mandamus.

Petitioners claim there is a conflict in the Circuit Courts regarding whether or not a Circuit Court of Appeals must treat an improper appeal as a petition for a writ of mandamus relying on Supreme Court Rule 17(a) as the basis for jurisdiction on their petition for certiorari. This "conflict" does not exist. An analysis of the cases cited by petitioners shows that they have attempted to take a court's application of a discretionary rule and label it a conflict.

Both of the cases remotely on point cited by petitioners to support their "conflict," state the general rule that depending on the circumstances of a case, a Court *may* treat an appeal as a petition for a writ of mandamus. *Sterling Forest Assoc., Ltd. v. Barnett-Range Corp.*, 840 F.2d 249, 252 (4th Cir. 1988); *Corcoran v. Ardra Ins. Co., Ltd.*, 842 F.2d 31, 35 (2d Cir. 1988). In *Sterling Forest*, the Court stated that it has the power to treat the appeal as a request for mandamus, but based on the facts of the case, did not need to exercise that power. *Sterling Forest*, 840 F.2d at 252-53.

In *Corcoran*, the Second Circuit Court stated that, "Although our normal practice is to decline to treat improvident appeals as petitions for mandamus, . . . we believe this case warrants a departure." *Corcoran*, 842 F.2d at 35. This language clearly indicates that the *Corcoran* Court was exercising its discretion, and not acting in conflict with an established rule. In that case, the Court had previously determined that the parties were not entitled to appeal a District Court's order remanding a removal case to the state court. The Second Circuit considered the appeal as a mandamus action because of the "public interest" involved. The case had been delayed for two and a half years because of actions outside of the parties' control and the Court did not want to delay the cause further by requiring them to file new papers to obtain a review by mandamus. *Id.*

Sterling Forest and *Corcoran* demonstrate that treating an appeal as a mandamus action is discretionary with the Circuit Court of Appeals and not a source of a "conflict among the circuits". In the present case, the Circuit Court did not find facts and circumstances to warrant treating petitioners' appeal as a mandamus. Instead they denied

the appeal and instructed petitioners to file a mandamus action in order to secure review of the transfer order. The Seventh Circuit's action was entirely within its discretion and not in conflict with other circuits. However, after the Seventh Circuit's order of dismissal, the petitioners elected not to file a petition for a writ of mandamus.

C. THE PETITION FOR CERTIORARI SHOULD FAIL AS IT DOES NOT COMPLY WITH SUPREME COURT RULE 21.5

Supreme Court Rule 21.5 states that "[t]he failure of a petitioner to present with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition." This petition resounds of inaccurate and incomplete statements of the record and inflammatory assertions. Petitioners make allegations and raise issues never before presented in this case. Based on the composition of the petition alone, this Court would have an adequate basis for denying the petition for a writ of certiorari.

CONCLUSION

This Court has not been presented with the grounds necessary to grant the petition for certiorari. The District Court's transfer of venue order was clearly not appealable and the Seventh Circuit was under no duty to treat petitioners' improper appeal as a petition for mandamus. Moreover, petitioners have not followed the appropriate avenue for review by filing a petition for mandamus as noted by the Seventh Circuit in its order of dismissal. Further, the Court is not presented with a "conflict in the circuits" nor has the Seventh Circuit so far departed from normal judicial practice that its actions warrant Supreme Court review. Therefore, respondent respectfully requests that this Court deny the petition for certiorari.

Respectfully submitted,

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13 pp

QUESTIONS PRESENTED

(1) Whether there is a conflict among the U.S. Courts of Appeals on the issue of whether an appeal from a non-final, non-appealable order should be treated as a petition for writ of mandamus where all of the federal circuits addressing this issue have held that the decision is entirely discretionary.

(2) Whether an order granting an intradistrict transfer of venue pursuant to 28 U.S.C. § 1404(a) is an appealable order conferring jurisdiction upon the Federal Circuit Court where such order is not final within the meaning of 28 U.S.C. § 1291, nor appealable as a matter of right on an interlocutory basis pursuant to 28 U.S.C. § 1292(b), nor a collateral order meeting the requisites of the *Cohen* collateral order doctrine (*Cohen v. Beneficial Finance Loan Corp.*, 337 U.S. 541 (1949)).

LIST OF PARTIES

The parties are those identified in the caption. In compliance with U.S. Supreme Court Rule 29.1, GENERAL PARKING CORPORATION states that it has no parent company or subsidiaries.

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Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondent, GENERAL PARKING CORPORATION, respectfully requests that this Court deny the petition for writ of certiorari seeking review of three orders of the Seventh Circuit on the basis that the petition presents no question of general importance, and there is no conflict among the Federal Circuit Courts on the issues presented by the petition.

OPINIONS BELOW

On December 14, 1989, the United States Court of Appeals for the Seventh Circuit dismissed petitioners' appeal from the order of the United States District Court, Northern District of Illinois, Western Division, dated October 2, 1989, which transferred the venue of petitioners' action from the Western Division of that Court to the Eastern Division, premised upon its lack of jurisdiction to hear the appeal. The Court of Appeals held that the order transferring venue was not appealable as a matter of right pursuant to 28 U.S.C. § 1291 because the order did not dispose of the case, nor was it a collateral order falling within the *Cohen* doctrine. The Court further held that the order was not appealable on an interlocutory basis because the district court denied certification of the matter under § 1292(b). (The order is reproduced as Appendix A to the petition).

The Court of Appeals' second order dismissed the petitioners' appeal from the district court's denial of certification of an interlocutory appeal under 28 U.S.C. § 1292(b). (The order is reproduced in Appendix B to the petition).

In its third order, dated January 16, 1990, the Seventh Circuit Court of Appeals denied petitioners' motion to re-

consider both of the December 14, 1989 orders, and denied all further relief sought in connection with petitioners' filing in the Seventh Circuit. (The order is reproduced in Appendix C to the petition).

In its orders of December 14, 1989 and January 16, 1990, the Court of Appeals noted petitioners had the option of filing a petition for writ of mandamus challenging the District Court's denial of their motion to transfer venue. To date, a petition for writ of mandamus with the Court of Appeals has never been filed.

None of the Court of Appeals or District Courts' orders are reported. They are reproduced in the petitioners' appendices.

JURISDICTION

The orders from which petitioners seek review were entered on December 14, 1989, and rehearing thereon was denied on January 16, 1990. The petition for writ of certiorari therefrom was filed within ninety (90) days, and the jurisdiction of this Court is invoked by petitioners under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1404. Change of venue

> (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

28 U.S.C. § 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1292. Interlocutory decisions

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. § 1254. Court of appeals; certiorari; certified questions

Cases in the court of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

REASONS WHY CERTIORARI SHOULD BE DENIED

PREFATORY NOTE:

THE FACTS AND ISSUES PRESENTED BY PETITIONERS WHICH ARE NOT PROPERLY BEFORE THIS COURT.

This appeal can present only two questions for review, both of which are procedural. Petitioners herein sought review of the district court's orders transferring the venue of this action pursuant to 28 U.S.C. § 1404(a) and denying certification for interlocutory review of the issue whether that transfer was appropriate. Because the Seventh Circuit had no jurisdiction to hear petitioners' claims on any of the asserted jurisdictional bases, it could not consider the merits of petitioners' claims that the intradistrict transfer was improper. Accordingly, the only questions to be considered in this Honorable Court are jurisdictional as well—namely:

(1) Whether the Seventh Circuit's discretionary determination to not treat the premature appeal as a petition for writ of mandamus presented a departure from the principles guiding other Federal Courts of Appeals; and

(2) Whether the Seventh Circuit was correct in its determination that it had no jurisdiction.

Therefore, in accord with its obligation under U.S. Supreme Court Rule 15.1, Respondent herein objects to most of petitioners' so-called facts (consisting mainly of blatant misstatements of the record interspersed with petitioners'

subjective observations and impermissible diatribe)[1], wholly irrelevant to the limited procedural issues presented for review, and in violation of this Court's Rule 14.1(g).

Furthermore, Respondent objects to issues 1, 2, 3, 5, 6, 8, 9, and 10, presented by petitioners, as not being within the scope of the issues which may be brought before this Honorable Court.[2] Moreover, those issues not having been properly raised before the Seventh Circuit, are waived. *See Michel v. Louisiana*, 350 U.S. 91 (1955); *Yakus v. United States*, 321 U.S. 414, 444 (1944).

I.

ALL FEDERAL APPELLATE COURTS CONSIDERING THE ISSUE OF WHETHER A JURISDICTIONALLY-DEFECTIVE NOTICE OF APPEAL SHOULD BE TREATED AS AN APPLICATION FOR MANDAMUS ARE IN ACCORD: THE ISSUE IS ONE OF DISCRETION.

There are no cases from the federal courts of appeals which hold that a notice of appeal must be treated as a petition for writ of mandamus. All of the courts of appeals which have considered the matter have held that the determination is a discretionary one; if the Circuit Court so chooses, it may treat a defective application for appeal as a petition for writ of mandamus, but it need not do

---

[1] Specifically, Respondent objects to the entirety of the "Statement of the Case" and its subparts, "Medical Disability Opposition to Change of Venue" and all its subparts, "Denial of Meaningful Due Process . . ." and all of its subparts.

[2] Accordingly, petitioners' discussion of reasons for granting the writ, commencing with "This case also involves toxic torts" *through and including* "Toxic discovery denial by defendants" should be disregarded in its entirety.

so.[3] In this case the Seventh Circuit chose not to do so. Rather, the Court suggested, on two occasions, that if petitioners desired a writ of mandamus, they should submit a proper petition. Why petitioners herein have chosen not to do so is beyond the realm of comprehension.

II.

NONE OF THE DISTRICT COURT'S ORDERS CHALLENGED BY PETITIONERS WAS APPEALABLE; ACCORDINGLY, THE SEVENTH CIRCUIT DID NOT ERR IN DISMISSING PETITIONERS' APPEALS FOR LACK OF JURISDICTION.

The only other question presented by the petition herein is the propriety of the Seventh Circuits' orders of December 14, 1989, dismissing plaintiffs' appeals, and its order of January 16, 1990, refusing to reconsider the December 14, 1989 orders. Quite simply, the Seventh Circuit had no other choice—it had no jurisdiction to entertain petitioners' appeal from either the order transferring the case from the Western Division of the Northern District of Illinois to the Eastern Division of the Northern District of Illinois, nor did it have jurisdiction to review the District Court's refusal to certify the question of intradistrict transfer for interlocutory review pursuant to 28 U.S.C. 1292(b).[4]

---

[3] *See* pages 8-10 of Respondents John Hancock Mutual Life Ins. Co. and Sudler and Co.'s Response to the petition herein. Inasmuch as that Response cites all of the relevant authorities, and in the interest of brevity, that discussion will not be repeated by this Respondent.

[4] *See* discussion of Respondent John Hancock Mutual Life Ins. Co. and Sudler and Co.'s Response to the petition at pages 10-12 (Section II). As the authorities cited therein completely address the issue, they will not be repeated in the interest of brevity.

CONCLUSION

Petitioners' petition for writ of certiorari should be the last meritless pleading filed by petitioners. The Seventh Circuit, on two separate occasions, pointed out the jurisdictional, and therefore fatal, defects to petitioners' appeals. But more importantly, the Seventh Circuit also advised petitioners of the proper method in which to present the issue of the propriety of the interlocutory venue transfer. Petitioners have yet to heed that advice.

Because petitioners can present no authority demonstrating that the Seventh Circuit was required to treat their defective appeal as a petition for a writ of mandamus or that the Seventh Circuit had jurisdiction over the appeal, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
SEP 20 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1984

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1989

FRANK L WHITMER AND JOAN P WHITMER,
Petitioners
v
JOHN HANCOCK MUTUAL LIFE INSURANCE CO., SKIDMORE, OWINGS AND MERRILL, SUDLER AND CO., SUDLER MARLING, INC., TISHMAN CONSTRUCTION CO., ALUMINUM COMPANY OF AMERICA, ADMIRAL HEATING AND VENTILATING, INC., R B HAYWARD CO., UNIVERSAL SHEET METAL CORP. d/b/a UNIVERSAL-HAYWARD, CUPPLES PRODUCTS CORPORATION, a DIVISION OF H H ROBERTSON CO., H H ROBERTSON CO., 175 EAST DELAWARE PLACE HOMEOWNERS ASSOCIATION, H S NACHMAN AND ASSOCIATES, INC., ENVIRONMENTAL SYSTEMS DESIGN, INC., L C KOHLMAN, INC., GENERAL PARKING CORPORATION, WILSON & McILVAINE, CITY OF CHICAGO, and DOES 1-50 INCLUSIVE,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY BRIEF

Frank L Whitmer and Joan P Whitmer
American Citizens on their own behalf, Petitioners
221 Pardridge Place, DeKalb IL 60115, 815/758-7272
September 1990

LAWthority® September 1990
BEST AVAILABLE COPY

No. **89-1984**

In The
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PETITIONERS' REPLY BRIEF

FINALITY AND CONFLICTS

The respondents, in their transparent zeal to confine Petitioners to a meaningless appellate procedure, ignore anything that does not suit their needs.

Opposing defendants have limited their objections to only two of the ten questions petitioners have presented:

> whether petitioners can appeal a transfer order under 28 USC § 1404(a),
>
> and whether the Circuit Court of Appeals should treat such an appeal, if necessary, as a petition for a writ of mandamus.

Consequently, respondents John Hancock Mutual Life Insurance Company and Sudler & Company have cited thirty-four cases, defendant (Burke) Wilson & McIlvaine has cited twelve cases, defendant General Parking Corporation has cited three cases, defendant 175 East Delaware Place Homeowners Association has adopted by reference, and the other thirteen or more defendants have neither responded or objected.

Then, without explanation or support, respondents called the attention of this United States Supreme Court to:

> *"On June 26, 1990 Judge Nicholas Bua of the Eastern Division dismissed this suit for want of prosecution when the Petitioners did not appear for a scheduled status before the court. As of the date of this Response to Petition for Writ of Certiorari, Judge Nicholas Bua's June 26, 1990 order of*

dismissal is still in effect, possibly causing Petitioner's Petition for Writ of Certiorari to become moot." (John Hancock Mutual Life Insurance Company Response, pages 4-5)

"On June 26, 1990, the District Court dismissed petitioners' First Amended Complaint with prejudice for want of prosecution. Thus, no underlying cause of action exists as of the date of filing of this response." (Burke Wilson & McIlvaine Brief in Opposition page 2)

As a consequence, all respondents' efforts concerning finality of the order are no longer valid—the transfer order has now become final, therefore appealable, and thereby is, can continue to be, before this United States Supreme Court.

Petitioners and this United States Supreme Court can now cut through the maze of conflicting opinions (including defendants' long list) that Professor Charles Alan Wright in his noted work on the *Law of Federal Courts, Fourth Edition*, introduces as:

"Section 1404(a) has given rise to a veritable flood of litigation. Probably no issue of civil procedure gives rise to so many reported decisions, year after year, as does this seemingly simple statute."

In *Federal Practice and Procedure 2d*, Professor Wright continues:

§3855 note 3. *"Unless a transfer order is reviewed at the time, it will as a practical matter never be reviewed at all. The transferee court hardly can vacate the judgment of the district court after trial, if it were otherwise correct, merely on the ground that the case should not have been transferred. In re Josephson, CA1st, 1954, 218 F2d 174, 180."*

"The propriety of some form of interlocutory review seems quite clear . . . ."

Note 6.1. *"Power of district court. Gower v Lehman, CA4th, 1986, 799 F2d 925, 927, quoting Wright, Miller & Cooper. In this case an order of a district court transferring a case to the Claims Court was held to come under this rule and to be immediately appealable as a collateral order."*

at page 477 *"The decisions are far from consistent among the circuits, or even within a particular circuit, but the overall impression is one of increased willingness by the courts of appeals to decide for themselves whether the trial court properly exercised its discretion on a § 1404(a) motion. Indeed, as has been discussed elsewhere, several of the circuits have now suggested that a district court that grants a transfer order stay that order for a short period so that appellate review may be sought."*

page 481 *"There is no agreement on the use of the writs to review the trial court's exercise of its discretion. The Supreme Court passed up an opportunity to provide guidance on this question, and the decisions of the courts of appeals, as several of them have remarked, are 'in hopeless conflict.' Indeed the variations among the circuits, and the changes of view within a particular circuit, are so great that the law on this point must be examined on a circuit-by-circuit basis.*

Supreme Court: Norwood v Kirkpatrick, 1955, 75 S Ct 544, 547, 349 US 29, 33, 99 Led 789.

Hopeless conflict: Great Northern Ry Co v Hyde, CA8th, 1956, 238 F2d 852, 856."

Obviously a totally disabled pro se plaintiff-petitioner, legally handicapped, recently reexposed to serious toxics on the defendants' premises, and seriously ill—cannot put his life at risk on such *"hopeless conflicts"* both between and within the circuits.

IT IS NOT PETITIONERS' PETITION FOR WRIT OF CERTIORARI THAT HAS BECOME MOOT, IT IS DEFENDANTS' OBJECTIONS TO FINALITY AND CONFLICTS THAT HAVE BECOME MOOT.

Now, for the purpose of review, a determination of finality, or *Cohen*, etc., is no longer necessary as there is a final order, and the transfer order itself has become final and is still before this United States ~~District~~ Supreme Court.

ALL ISSUES IN PETITIONERS' "QUESTIONS PRESENTED" ARE PROPERLY BEFORE THIS UNITED STATES SUPREME COURT

Petitioners expect that this is a case of first impressioin for they hope that no other case of the many proposed to this United States Supreme Court involves:

a choice between justice,
or the health, life and death of a plaintiff.

Petitioners filed their Petition for Writ of Certiorari because no other Court of Appeals had, or would attend to, the grave violations of their constitutional rights to due process, equal protection and access to the courts by the Federal district Courts. It is for this reason that petitioners specifically invoked Rule 10(a) of the Supreme Court. (Petition for Writ of Certiorari, p30.)

Rules of the Supreme Court, Rule 10. (Emphasis added.)

"A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter . . . or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

* * *

(c) When . . . a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court."

Petitioners ten "Questions Presented" are more than a notice of appeal as a petition for writ of mandamus, or the appealability of a venue transfer—they are actually the total reason for petitioners being in the federal courts of review—a constant denial or ignoring in any court of their injury, their disabilities, or their handicaps, and the consequent destruction of not only their health but their cause.

This includes the ignoring and suppression of petitioner Frank L Whitmer's adjudication as totally disabled by a Social Security Administrative Law Judge, the further ignoring and suppression of uncontroverted medical affidavits and evidence, willfull violations of the rules,

sanctions and tainted motions, denial of discovery, and the protection of an injured plaintiff's health and life from the very people that he claims first injured him.

Each and every one of petitioners' "Questions Presented" were established and objected to in the Federal district Court, excepting, of course, those dealing with a conflict in the circuits—and even there the federal district court judge himself had laid out exactly the procedure petitioners had expected would be followed.

Petitioners' ten "Questions Presented" clearly support their concern of deprivations of constitutional rights as citizens of the United States and the State of Illinois. This was also the actual thrust of their Notices of Appeal to the Seventh Circuit Court of Appeals.

Not only did they not succeed in that contention with that Court of Appeals, but as question six states, six critical pages were stripped from petitioners' Notice of Appeal by the defendants in their motion to dismiss—and petitioners appeal was improperly dismissed over their objections.

Petitioners' Petition for a Writ of Certiorari is totally based on the actual pleadings, motions, and supporting affidavits provided to the Federal District Courts and the United States Court of Appeals.

The Illinois Housing Court Judge's statement regarding the ventilation code violations in the John Hancock Center in Chicago were clearly, *"you may have an action against John Hancock or even against the city for malfeasance."* (Transcript March 7, 1984, page 185.)

That is what petitioners have been trying to do over the last few years.

The health and safety violations and the litigation are not ordinary. It is a matter of health, life and death, and the realistic enforcement of the protections of the health and safety codes against powerful and wealthy major American corporations.

CONCLUSION

Sooner, or later, life—death—freedom—and health is exactly what liberty is all about.

Petitioners ask that this Court issue its petition for a writ of certiorari to the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

Frank L Whitmer and Joan P Whitmer
American Citizens on their own behalf, *Petitioners*
221 Pardridge Place, DeKalb IL 60115, 815/758-7272
20 September 1990

[appendix follows]

Minute Order

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Judge Nicholas J Bua
Case Number 89 C 8341 June 26, 1990

FRANK WHITMER v. JOHN HANCOCK MUTUAL LIFE INSURANCE CO.

[Other docket entry:]

Cause called for status hearing. Plaintiffs failed to appear. Order cause dismissed for want of prosecution.

Docketing to mail notices.
courtroom deputy's initials: fda'
number of notices: 14 & MF
date docketed: June 27, 1990
docketing dpty: initials: LG
date mld notices: June 27, 1990
mailing dpty: initials LG